No. 12383

In the United States Court of Appeals for the Ninth Circuit

IVA TOGURI D'AQUINO, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

(a) The United States District Court for the Northern District of California had jurisdiction over the appellant for the offense of treason alleged to have been committed in Japan (18 U. S. C. § 1, 1946 Ed.) because that was the Federal Judicial District into which she was first brought (18 U. S. C. § 3238, Rev. Ed.).

(b) The appellant was charged with committing treason while residing in Japan during the war. She was apprehended in Japan and brought to San Francisco directly from the Orient on an Army transport under custody of the military authorities, arriving in San Francisco, Cali-

fornia, on September 25, 1948 (2 Tr. 120, 122, 123, 134, 148, 149).[1]

(c) The statutory provisions involved are as follows:

Section 1, Title 18, United States Code (1946 Ed.) provides:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Section 3238, Title 18, United States Code (Rev. Ed.) provides:

> The trial of all offenses begun or committed on the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.[2]

(d) This court has jurisdiction of the appeal under the provisions of Sections 1291 and 1294 of Title 28, United States Code (Rev. Ed.).

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[1] Pages in the printed portion of the record are designated by the letter "R" preceded by the volume number. Thus, "2 R. 464" is volume 2 of the printed record at page 464. Pages appearing in the typewritten portion of the record are designated "Tr." preceded by the volume number. Thus, "20 Tr. 2021" is volume 20 of the transcript at page 2021. Since the argument of counsel is numbered separately, reference to portions of the argument is designated by the letters "Arg." preceded by the volume number. Thus, "2 Arg. 233" is volume 2 of the argument at page 233. The Roman numerals on the transcript have been converted to Arabic for convenience and because they are not entirely correct. For example, the reporter has marked volumes 40-49 as "XXXX" where it should have been "XL."

[2] The revised Title 18 of the United States Code became effective on September 1, 1948. Appellant arrived in San Francisco, California, on September 25, 1948.

STATEMENT OF THE CASE

Appellant was indicted for committing treason against the United States, the indictment alleging the commission of eight overt acts (1 R. 2-7). On September 29, 1949, she was convicted, the jury returning special findings[3] that the appellant had committed overt act No. 6 with an intent to betray the United States. The jury also found that she did not commit the remaining overt acts with an intent to betray the United States (1 R. 255-260). Thereafter, appellant filed motions in arrest of judgment, for judgment of acquittal, and for a new trial (1 R. 261-269), which were denied on October 6, 1949, after argument (1 R. 325-326). This is an appeal from the judgment of the court in sentencing her to be imprisoned for a period of ten years and to pay a fine of $10,000 (1 R. 327-328). The facts presenting the questions involved are more fully set out hereafter.

SUMMARY OF FACTS

1. The Indictment

On October 8, 1948, appellant was indicted in the District Court for the Northern District of California for treason (1 R. 2-7). The indictment alleged that appellant was at all times a native born citizen of, and a person owing allegiance to, the United States, and that between November 1, 1943, and August 13, 1945, she treasonably adhered to the Imperial Japanese Government and the Broadcasting Corporation of Japan, then enemies of the United States, giving them aid and comfort. The indictment charged that the adherence to the enemies of the United States by the appellant and her giving aid and comfort to them consisted

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[3] The jury was directed to return special findings as to each overt act because of the decision of the Supreme Court in *Cramer* v. *United States*, 325 U. S. 1, 36. Special findings have been utilized in *Chandler* v. *United States*, 171 F. 2d 921 (C. A. 1), cert. denied, 336 U. S. 918; *Gillars* v. *United States*, 182 F. 2d 962 (App. D.C .); *Best* v. *United States*, 184 F. 2d 131 (C. A. 1); *United States* v. *Burgman*, 87 F. Supp. 568, 89 F. Supp. 288; and in *Kawakita* v. *United States* (now on appeal to this court from the Southern District of California, C. A. No. 12061).

(1) of her working as radio speaker, radio announcer, radio script writer and as broadcaster of recorded music in the short wave broadcasting station of the Broadcasting Corporation of Japan which was controlled by the Japanese Government, including the preparation and composition of radio scripts, talks, and announcements, the announcing of the same and the announcing and introduction of musical recordings and talks for broadcast by radio from Japan to members of the armed forces of the United States and their Allies in the Pacific Ocean area and to people elsewhere; and (2) of her working as composer and organizer of radio broadcasting programs for subsequent broadcast by radio from Japan to members of the armed forces of the United States and their Allies in the Pacific Ocean area and to people elsewhere. It was charged that appellant's activities were intended to destroy confidence in the war effort of the United States and its Allies, to undermine and lower their military morale, to create nostalgia in the minds of the American and Allied armed forces, to create war weariness among the members of such armed forces, to discourage the members of such armed forces and to impair the capacity of the United States to wage war against its enemies (1 R. 2-5).

The indictment specified eight overt acts involving incidents of appellant's broadcasting activities all of which were charged to have been committed in the execution of the treason with treasonable intent and for the purpose and with the intent of adhering, and giving aid and comfort to enemies of the United States (1 R. 4-7).

The jury returned a verdict of guilty as charged, and returned a special finding that the appellant committed one overt act, the sixth, with an intent to betray the United States, and that she did not so commit the others (1 R. 255-260).

2. Venue

Appellant was apprehended at Tokyo, Japan, by the military authorities on August 26, 1948, pursuant to a war-

rant of arrest issued under the authority of the Supreme Commander for the Allied Powers to the Provost Marshal, General Headquarters, Far East Command. The warrant was issued upon the complaint and sufficient information by the Department of Justice, United States Government, that the defendant was suspected of treason (Exs. BL, EO).

Appellant left Sugamo Prison, Yokohama, Japan, in the company of and under guard of Captain John P. Prosnak, corps of military police, and WAC Captain Katherine Stull, who were acting under orders from General Headquarters, Far East Command, and was taken on board a United States Army Transport for return to the United States. Upon arrival at San Francisco on September 25, 1948, appellant was delivered to special agents of the Federal Bureau of Investigation who took her into custody. (2 Tr. 132-134, 146-149, 119-123; Exs. 12, C, D, E, F, G, H, I, BD, BM.) Appellant verified these facts and did not contradict them when she became a witness on her own behalf (47 Tr. 5236). She was arraigned before a United States Commissioner in San Francisco on September 25, 1948 (the day of arrival) at 12:30 p.m. (47 Tr. 5237).

3. Appellant's Citizenship

Appellant was born in Los Angeles, California, on Independence Day (July 4) 1916, of foreign parents who had been born in Japan (Exs. 3, 4, 5, 6, 7, 15, 44 Tr. 5235). Although appellant's name had been entered in the family register in Japan shortly after her birth, it was taken off in 1932 when her father took steps to have her renounce her Japanese nationality (47 Tr. 5241-5242, 49 Tr. 5500-5501), and the loss of her Japanese nationality appears on the family register in Tokyo (47 Tr. 5255). She was a registered voter in Los Angeles and voted in the general election in 1940 (Ex. 6). On July 5, 1941, appellant went to Japan for a visit and to study medicine (44 Tr. 4912, 22 Tr. 2345). She applied for a passport as an American citizen on September 8, 1941 (Ex. 4; 44 Tr. 4922), which was

not granted because of the outbreak of war with Japan (Ex. TT). On March 30, 1942, she applied for evacuation from Japan to the United States but withdrew her request on September 2, 1942 (Ex. 7).

On April 19, 1945, she married Felipe D'Aquino (43 Tr. 4759), who was born in Tokyo and is one-quarter Portuguese blood and three-quarters Japanese blood (44 Tr. 4851-4854, 43 Tr. 4733-4736). Felipe D'Aquino claims Portuguese nationality through his grandfather and is registered as a Portuguese citizen in the Portuguese Consulate at Tokyo (2 R. 727-730, 745-747, 755-756). Appellant's marriage to Felipe D'Aquino was registered with the Portuguese Consulate at Tokyo on June 18, 1945 (2 R. 748-750) and she was registered as a Portuguese citizen in the records of the Portuguese Consulate at Tokyo (2 R. 753-755). The Portuguese Consul stated in a deposition that under Portuguese law Portuguese citizenship is conferred upon a woman who marries a male citizen of Portugal (2 R. 735-737) and that under Portuguese law appellant became a citizen of Portugal by virtue of her marriage to Felipe D'Aquino (2 R. 736).

Upon her arrival in Japan appellant obtained a resident's permit to stay in Japan (44 Tr. 4921). After the outbreak of war, appellant was visited by the Japanese police who on various occasions suggested that she obtain Japanese citizenship (44 Tr. 4933-4934). Appellant told them that she would never become a Japanese citizen (44 Tr. 4934; 45 Tr. 4966) and she did not take any steps whatsoever to become a Japanese citizen (45 Tr. 4959; 49 Tr. 5518). Appellant advised her Japanese-American friends never to change their citizenship (46 Tr. 5100) and while she was working at Radio Tokyo she told people that she was an American citizen (47 Tr. 5248).

Appellant claimed American citizenship in 1946 and 1947 (49 Tr. 5494-5498, 50 Tr. 5523, 5554) and on May 26, 1947, applied for a passport as a native citizen for return to the United States in which she swore that she had never ob-

tained naturalization in a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered or served in the armed forces of a foreign state; accepted or performed the duties of any office, post, or employment under the government of a foreign state or voted in a political election in a foreign state or participated in an election or plebiscite to determine sovereignty over foreign territory, or made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state (Ex. 5). Appellant also submitted to the United States Consul General a certificate from the Archives and Document Section, Home Minister's secretariat, that there was "absolutely no evidence that she had taken procedures to regain her Japanese citizenship since her arrival in Japan in 1941" (Ex. 11). She also wrote several letters to the Consular office setting forth her activities in Japan and stating that she "was always under the impression" that she was a United States citizen (Ex. 10) and that she had never recovered her Japanese citizenship but had registered with the Japanese police as an American National (Exs. 8, 9, 10). At the trial, appellant testified that she still wanted to be a United States citizen (50 Tr. 5554).

The Court charged the jury that the Government must prove appellant was an American citizen during the period of time the acts complained of in the indictment were committed; that her marriage did not in and of itself expatriate appellant, that she had the right to expatriate herself but that it must be by some voluntary act of renunciation or abandonment of American nationality and allegiance. The jury was charged that Section 401 of the Nationality Act of 1940 provided, in part, that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by (a) obtaining naturalization in a foreign state upon her own application, or (b) taking an oath, or making an affirmation or other formal declaration of allegiance to a foreign state. The Court also charged

that the jury could not find the appellant guilty of any treasonable act even though it should find she committed one or more of the overt acts charged in the indictment, unless it found from the evidence beyond a reasonable doubt that at the time of the commission of such act appellant was an American citizen owing allegiance to the United States (56 Tr. 5958-5963).

4. Appellant's Activities Prior to November 1943

Appellant was born in California in 1916 (Ex. 3), attended various grade and high schools in southern California (Ex. 4), and was graduated from the University of California, Los Angeles branch, in January 1940 with a bachelor of arts degree (47 Tr. 5255). She then studied for six months in the graduate school of that university, working toward a master of arts degree (47 Tr. 5256), and in the spring of 1941 she told a friend that she was interested in the study of medicine and planned on going to Japan for the purpose of attending medical school there (22 Tr. 2345), since she had relatives in Japan who were in the medical field (22 Tr. 2346).

Appellant left Los Angeles on the *Arabia Maru* on July 5, 1941, and arrived in Japan on July 24 or 25, 1941 (40 Tr. 4497). She took with her 25 or more boxes of articles including food, medicine, clothing and a sewing machine (49 Tr. 5489-5490). She attended a Japanese language and culture school in Tokyo until December 1942 (Ex. 24) and worked as a part time typist at the school until July 1942 (Ex. 24). From the summer of 1942 to the summer of 1943, appellant monitored short wave foreign broadcasts for Japan's Domei News Agency (21 Tr. 2281) but was dissatisfied with this work and sought employment at Radio Tokyo (21 Tr. 2282). In the fall of 1943, appellant went to work for the Broadcasting Corporation of Japan as a typist at a salary of 100 yen a month (Ex. 13).

In the interim appellant had made some effort toward evacuation from Japan in the spring of 1942, but finally

waived and abandoned her request to return to the United States. This waiver was executed in writing under date of September 2, 1942, and is quoted in *haec verba* as follows: "I hereby wish to express my wish to remain in Japan for the present, and hereby withdraw my request to be evacuated" (Ex. 7). Appellant was not particularly interested in returning to the United States because she felt that she might be interned in a detention center if she returned here (40 Tr. 4538-9; Ex. 68).

In the fall of 1943 appellant embarked upon her broadcasting career for the Broadcasting Corporation of Japan (10 Tr. 907). Several times during her employment as broadcaster she sought and obtained pay raises (9 Tr. 665; 10 Tr. 934; 25 Tr. 2795, 2796), and at the conclusion of her career she was receiving the sum of 180 yen a month (Ex. 13), which was about the same pay as that of her superiors (9 Tr. 660). In addition, from January 1944 to May 1945 she received 150 to 160 yen per month for secretarial work at the Danish Legation (2 R. 807). In the spring of 1945 she married Philip D'Aquino, who was employed at Domei News Agency at a salary of 100 yen per month (44 Tr. 4855).

5. Governmental Control of the Broadcasting Corporation of Japan

The Broadcasting Corporation of Japan was a non-profit corporation (10 Tr. 898; 11 Tr. 1013) which was required to obtain the approval of the Ministry of Communications of the Japanese Government for all expenditures for equipment (13 Tr. 1329), for the corporate budget (13 Tr. 1331), for all dispositions of corporate funds (13 Tr. 1330, 1332) and the settlement of accounts (13 Tr. 1331). During the period set forth in the indictment (November 1943-August 1945) the Ministry of Communications authorized the collection of license fees from all listeners and owners of radio receiving sets (10 Tr. 898; 13 Tr. 1328). The Ministry of Communications was required to authorize the organization

of offices and the resignation and appointment of all executive officers (13 Tr. 1332).

The Broadcasting Corporation of Japan (Radio Tokyo) was controlled by the Imperial Japanese Government through six governmental agencies: the Communications Ministry, the Foreign Affairs Ministry, the Ministry of Greater East Asia, the Board of Information, the Army General Staff, and the Navy General Staff (10 Tr. 898-899), and was the principal channel used by the Government for the dissemination of propaganda (4 Tr. 245).

The Broadcasting Corporation of Japan was divided into three bureaus: the Technical Bureau, the Domestic Bureau, and the Overseas Bureau (10 Tr. 899), and was charged with the responsibility for all short wave broadcasts emanating from Japan (10 Tr. 900). The Overseas Bureau consisted of five departments: the Business Department, the Editorial Department, the European Continent Department, the Asiatic Continent Department, and the American Continent Department (10 Tr. 901). The American Continent Department was itself divided into five sections: the News Section, the Announcers Section, the Latin American Section, the Special Features Section, and the Front Line Section (10 Tr. 902). The Front Line Section was in charge of all short-wave broadcasts beamed to Allied troops in the South Pacific ocean area, and the "Zero Hour" program, on which appellant broadcast, was its responsibility (10 Tr. 903).

The eighth section of the Bureau of Information was under the control of the Imperial Japanese Army, headed by Colonel Isao Takeda and his deputy, Lieutenant Colonel Shigetsugu Tsuneishi (3 Tr. 233-234). This section of the Bureau of Information was concerned with broadcasting propaganda designed to weaken the will of Allied troops to fight (3 Tr. 236-239; 4 Tr. 241, 243). Lieutenant Colonel Tsuneishi was a member of the governmental committee on overseas broadcasts, composed of representatives from the Cabinet, the Greater East Asia Bureau, the Army, the

Navy, the Department of Communications, and the Department of the Interior (4 Tr. 241-242).[4] Its object was to coordinate broadcasts and information concerning the war (4 Tr. 242).

Lieutenant Colonel Tsuneishi was in charge of and supervised the arrangement of a program known as the "Zero Hour" (4 Tr. 241, 277), the governmental and official purpose of which was to broadcast propaganda (4 Tr. 241, 244). This was to be effected by broadcasting music, news, and commentaries containing propaganda to Allied GI's (4 Tr. 243). The "Zero Hour" was used as an instrument of psychological warfare by broadcasting to the Allied troops in an endeavor to cause them to be homesick and to be tired of or disgusted with the war (4 Tr. 244-245; 9 Tr. 739-740; 10 Tr. 905-929), and persons working on that program were considered essential to the Japanese defense effort (9 Tr. 732-733).

The "Zero Hour" broadcasts were carried by cable from the broadcasting studios in Tokyo to the transmitting towers at Nazaki, Yamata, and Kawachi (22 Tr. 2356), which were equipped with directional antennae for the purpose of sending strong waves in a desired direction (22 Tr. 2372). The broadcasting equipment at Radio Tokyo was of the highest quality (22 Tr. 2357), and from 1943 to 1945 was in good condition (22 Tr. 2350). The cables to the transmitters and the transmitting apparatus at Nazaki, Yamata, and Kawachi were in excellent condition from a scientific standpoint during the years from 1943 to 1945 (22 Tr. 2357, 2368).[5] The "Zero Hour" program was beamed to Allied troops in the South Pacific ocean area as disclosed by the azimuthal maps introduced in evidence through the testimony of experts (Exs. 40, 41, 42, 43).

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[4] Appellant introduced evidence through her own witness on direct examination that the Zero Hour was under the jurisdiction of Imperial Japanese Army Headquarters at Tokyo (32 Tr. 3633).

[5] For pictures of the broadcasting equipment, see exhibits 27, 28, 29, 31, 32, 33, 35, and 38. For a picture of the Nazaki transmitter, see exhibit 34.

6. The Purpose of the Zero Hour Program

In the early fall of 1943, while appellant was working as a typist at Radio Tokyo (11 Tr. 1081), the Japanese Army General Staff conceived the idea of expanding a twenty-minute program of American dance music known as the "Zero Hour" into a new program of one-hour duration, with the same name (9 Tr. 709-718; 11 Tr. 1061-1063), and were interested in securing a new voice, preferably a female whose voice was unknown to radio listeners and not stereotyped, to be used on this program (14 Tr. 1435). Appellant was given a voice test (11 Tr. 1089) and she possessed a very rich and charming radio voice (25 Tr. 2746; 40 Tr. 4462, 4478) which was especially suited for use on the Zero Hour because it would be appealing to American fighting men (12 Tr. 1102). In November 1943, appellant was told by George Mitsushio, who was to be responsible for the expanded program (10 Tr. 897), that she was to participate in a special type of program in which the personnel of the program would devote themselves solely to the preparation and broadcasting of propaganda material to be beamed by radio to the American armed forces in the South Pacific area for the purpose of bringing about a feeling of homesickness, nostalgia, and war weariness among the troops (10 Tr. 908-910). A few months later she was again told about the purpose of the program (9 Tr. 661-663; 10 Tr. 911-914). Appellant was told that she was to prepare scripts and broadcast on this program (10 Tr. 910). Appellant admitted knowing that she was to be a broadcaster on a propaganda program (14 Tr. 1424), and testified that she knew that the foregoing was the governmental purpose of the Zero Hour program (47 Tr. 5306, 5308, 5309).[6]

In March 1944 the Front Line Section was formed at Radio Tokyo to take over the responsibility of the Zero

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[6] Appellant's witness Reyes testified that the purposes of the Zero Hour program had been explained to appellant and that she knew what they were (33 Tr. 3789-3790).

Hour program (12 Tr. 1124, 1129) and a meeting was held by Mitsushio at which appellant and other participants on the Zero Hour were present (10 Tr. 911; 12 Tr. 1125-1128). The purpose of this meeting was to give instructions to the personnel of the newly created Front Line Section (10 Tr. 912). On this occasion appellant was told that the Zero Hour had become expanded into what was a large program and was to be administered by the Front Line section (10 Tr. 912), that her superiors felt that this type of broadcast to the Allied troops was becoming increasingly important (10 Tr. 912). Appellant and others were told that the work of the Front Line Section was to be devoted solely to preparation of scripts and programs and to broadcasting to the American fighting forces in the South Pacific, and that some of the material would be supplied by the Japanese Army General Staff (10 Tr. 912; 12 Tr. 1129). It was explained that the program was to be one of the psychological weapons of the Japanese armed forces (10 Tr. 913; 12 Tr. 1130), that the purpose was to create an audience among the American soldiers in the South Pacific by putting on a very good entertainment program (9 Tr. 662; 10 Tr. 914; 12 Tr. 1130-1131) and, once their attention was captured, to broadcast propaganda which would lower the morale of American soldiers, make them homesick, war weary, and discouraged (9 Tr. 662; 10 Tr. 911-914; 12 Tr. 1130).

In the spring of 1944 at a luncheon in Tokyo attended by appellant and other members of the Zero Hour program, Lieutenant Colonel Tsuneishi told them that the war was not going well for Japan and that the Zero Hour program was becoming more important strategically because of the continuous American landings on Pacific islands (9 Tr. 663-664; 10 Tr. 917; 4 Tr. 247). Tsuneishi informed the group that the Zero Hour programs were successful and asked them to continue their best efforts in that work (4 Tr. 247; 9 Tr. 663; 10 Tr. 917).

Appellant admitted that no physical force, compulsion, duress, coercion, pressure or threat thereof was exerted upon her by the Japanese or anyone else to compel her to take the broadcasting position at Radio Tokyo or to continue in that job (47 Tr. 5289-5290; 48 Tr. 5332-5337; 49 Tr. 5502-5504; Ex. 24).

Appellant testified that she knew that the Zero Hour program was propaganda (47 Tr. 5308) and that its purpose was to lower morale of American troops (47 Tr. 5309). She admitted knowing that the program was designed to create homesickness, nostalgia, and war weariness among those soldiers (47 Tr. 5306-5307) and that the Broadcasting Corporation of Japan was under the domination of the Japanese Army General Headquarters (47 Tr. 5313). Nonetheless, she stated that she was glad to have had the opportunity to learn broadcasting work and technique (47 Tr. 5317).

She also told others that she accepted the broadcasting job and liked it because it paid more than a typist received (7 Tr. 487; 14 Tr. 1405; Ex. 68), the work hours were shorter (Ex. 68), the work more interesting (14 Tr. 1405; 40 Tr. 4531, 4532), the contacts and surroundings were enjoyable, and she thought she might be able to find a future in radio work (14 Tr. 1405). Moreover, appellant did not like to type (13 Tr. 1362) and admitted on the witness stand that she found her work on the radio was interesting (48 Tr. 5361). She was a good and efficient announcer (24 Tr. 2546) who read scripts intelligently and whose work was good (33 Tr. 3792, 3802). After the war appellant told newspaper correspondents that compared to the work of other girls at the studio she felt her work was comparatively easy (7 Tr. 487), that her experience on the air had been educational in that she had learned radio and microphone technique and that she was thrilled on hearing the recording of her own voice (7 Tr. 488). Appellant's husband had warned her several times to stop broadcasting

but she felt that "you can't just quit" (7 Tr. 488; 44 Tr. 4878, 4905, 4906, 4907).

Appellant was not trusted by two of the American prisoners of war who worked with her on the Zero Hour and who testified on her behalf as defense witnesses. The American Army officer Wallace E. Ince testified that at the time appellant was recruited as a broadcaster, he did not want to include her in the program because he did not trust her and that he never told her of an agreement between Reyes, Cousens and himself to frustrate the Japanese propaganda effort because he did not trust the appellant (31 Tr. 3532-3533, 3550-3551). Norman Reyes, also a prisoner of war who testified for appellant, had previously given statements to the Federal Bureau of Investigation agents that "he did not trust her, (appellant) having gained the impression that she was pro-Japanese" and that the only agreement between Ince, Cousens and himself was the one to plead duress after the war so that nothing would happen to them. He affirmed the truth of the above statements on cross-examination (33 Tr. 3745-3746, 3785-3787).

Although appellant was absent from her work on certain occasions in 1944, she was not disciplined by the Japanese as a result of the absences and in fact received a raise in pay shortly thereafter (44 Tr. 4888). In the spring of 1945 she was again absent for a period in excess of one month, and she ignored a card requesting her to return to work (44 Tr. 4858-4859). According to her own testimony, she was never jailed, assaulted, beaten, whipped or ill-treated by the Japanese police (47 Tr. 5290-5291). Appellant's co-workers among the Japanese employed at Radio Tokyo testified that they did not observe any duress, coercion, or compulsion being exercised upon or against the appellant (24 Tr. 2510, 2542, 2548; 25 Tr. 2752, 2753, 2684, 2685).

7. Appellant's Compensation

Appellant received 180 yen a month for her part-time afternoon work at Radio Tokyo (Ex. 13), which was in addition to compensation she received from other sources. At first she received 130 yen a month while employed at Domei News Agency (49 Tr. 5482), and later, when employed as stenographer by the Danish Legation, she was paid 150 yen a month until July 1944 and then 160 a month until May 1945, with a bonus of an extra month's salary on New Years (2 R. 807). Her husband earned 100 yen a month as a linotype operator (44 Tr. 4855). Her salary at Radio Tokyo and her salary from the Danish Legation were each in excess of the compensation received by her fellow employees for full-time work at Radio Tokyo. For example: Igarashi, a Japanese announcer at Radio Tokyo, never received more than 120 yen a month in return for his services there (24 Tr. 2607); Kenkichi Oki, who was the production supervisor of the Zero Hour program, received approximately 120 yen a month in 1943 and 140 yen a month in 1944 as remuneration for his services as supervisor (9 Tr. 660); Moriyama, a staff member of the Zero Hour production unit working as such three hours a day for six days a week, received 150 yen a month as remuneration for said work (24 Tr. 2544-1545); Chiyeko Ito, appellant's Nisei friend, received the sum of 125 yen per month as compensation for her services as typist and linotype operator (40 Tr. 4533).

8. Appellant's Participation in the Zero Hour Program

The Zero Hour was a "live" program (19 Tr. 1957) of one hour duration[7] (Exs. 25, 63, 75; 9 Tr. 751; 11 Tr. 1062, 1088; 24 Tr. 2520), originating at Radio Tokyo and broadcast between 6 and 7 p. m. (9 Tr. 782; 32 Tr. 3602-3603; Ex.

[7] Appellant and defense witnesse Consens and Ince testified that the program was 1 hour and 15 minutes and was broadcast between 6 and 7:15 p. m. Tokyo time (29 Tr. 3204; 31 Tr. 3475; 45 Tr. 5000).

63, 75) six days a week (12 Tr. 1152; 45 Tr. 5017). From November 1943 to May 1944 appellant appeared on this program every night and from May 1944 until late August 1945 she worked five days a week (45 Tr. 5017; 9 Tr. 756-757; 12 Tr. 1152; 24 Tr. 2546) broadcasting under the radio pseudonym of "Ann" and "Orphan Ann" (12 Tr. 1254; 45 Tr. 5008-5010, 52 Tr. 5847; Exs. 25, 63, 75).[8] Although the program had several formats (31 Tr. 3477) it consisted of a mixture of news announcements, musical recordings, and commentaries (29 Tr. 3205-3207; 45 Tr. 5001; Exs. 23, 25, 63, 75).[9] Appellant's duties consisted of playing recordings of light classical and popular American songs of a sentimental nature (45 Tr. 5002, 5004; Exs. 25, 63) interspersed with brief comments and remarks addressed to American troops (10 Tr. 924-925; 12 Tr. 1131, 1140-1142; 24 Tr. 2537, 2538, 2539, 2506, 2533, 2552, 2619-2620; 32 Tr. 3613; Ex. 23, 25). These remarks were of a character designed to make the soldiers think of their loved ones at home (24 Tr. 2552; 25 Tr. 2750, 2790), their former happiness as compared with their present plight (25 Tr. 2752; Ex. 15), to instill doubt about the faithfulness of their wives and sweethearts (25 Tr. 2664; 7 Tr. 486), to make them envious and resentful of the workers back home (18 Tr. 1877), to make them apprehensive of their military position (18 Tr. 1882), to create in their minds the idea that the fight against the Japanese was futile (18 Tr. 1880), and to induce them to stop fighting (25 Tr. 2682-2684; 18 Tr. 1881).

The news and commentaries broadcast preceding and following appellant's appearance at the microphone were

[8] Appellant testified that she was absent on certain occasions due to illness, her marriage and other reasons (45 Tr. 5065-5072).

[9] According to one defense witness, at one time the program consisted of 10 minutes of POW messages, 10 minutes of introduction, 10 minutes of music introduced by appellant, 10 minutes of American home front news, 10 minutes of music introduced by appellant, 15 minutes of dance music introduced by Normando Reyes, 10 minutes of news highlights, 4 minutes of news commentaries, sign off (29 Tr. 3205-3207). Appellant's description of the program was substantially the same (45 Tr. 5001-5006; Ex. 15).

propaganda of a high order calculated to undermine the morale and confidence of American soldiers on the fighting fronts (Exs. 15, 63, 75; 17 Tr. 1828-1832; 33 Tr. 3791-3792, 3810). News reports dealt with intense Japanese resistance on all fronts, reports of American and Allied losses of ships and men, and were worded in such a manner as to encourage the belief that the Japanese were exacting terrific losses in return for any gain by the Allied powers (Exs. 15, 63, 75; 10 Tr. 930-931; 34 Tr. 3859, 3860-3861). Commentaries were written in such a manner as to encourage grave doubt about the veracity of American announcements concerning military operations and to cast suspicion upon our military and civilian leaders (Ex. 75).

Specific remarks and comments made by appellant during her broadcasts on the Zero Hour were heard and remembered by some of her Japanese co-workers at Radio Tokyo and by American soldiers and sailors who had served in the South Pacific and were able to identify appellant's voice. Appellant also related to war correspondents and others some of the things she had said while working as a broadcaster.

(a) Witnesses at Radio Tokyo.

In November or December 1944, a radio announcer named Igarashi (24 Tr. 2605), whose salary was less than that of appellant (24 Tr. 2607), heard her say, in substance, "The Americans claim that your ships were not sunk by the Japanese but the fact is that your ships were sunk by the Japanese, and you have no ships" (24 Tr. 2619; 25 Tr. 2662). On another occasion between January and March 1945 he heard her broadcast, in substance:

> Your sweethearts and folks are waiting for you back in the United States, so why not stop fighting and go back to the states and enjoy life? [25 Tr. 2664.]

Villarin, a Filipino who had been captured at Bataan and taken to Tokyo as a student for indoctrination (26 Tr. 2850), visited Radio Tokyo a number of times and met ap-

pellant (26 Tr. 2852, 2854). On two occasions he observed appellant's broadcast through an open studio door at a distance of about twelve feet (26 Tr. 2852, 2854). On the first occasion in March 1944 he heard and saw her say in substance, "Hello Honorable Enemy. Why do you have to stay in the foxholes of New Guinea when your girl friends back home are running around with other men? It is about time you fellows went back home" (26 Tr. 2853). In May 1944, under the same circumstances, Villarin observed appellant while she was broadcasting and heard her say, in substance, "You are wasting your time in the South Pacific when you could have fun back home" (26 Tr. 2855-2856). Villarin recorded this incident in his diary (26 Tr. 2854).

A censor named Notomu Nii (25 Tr. 2678), who was in the studio while appellant was broadcasting, heard her say, in substance, to the troops, "Why don't you stop fighting and listen to good music?" (25 Tr. 2682). On another occasion he was present when she broadcast, in substance, "Why don't you go back to your loved ones in the states instead of fighting in the jungles with mosquitoes from foxholes" (25 Tr. 2684).

A former typist at Radio Tokyo recalled hearing appellant make frequent mention of the wives and sweethearts of American fighting men in her broadcasts (25 Tr. 2790). In the fall of 1944 she heard appellant say in substance, over the air, on three different occasions, "How are you boys in the Southwest Pacific? Are you having a good time with the girls on the Islands?" (25 Tr. 2749); "Do you miss your wives and sweethearts in the states?" (25 Tr. 2750); and "Don't you miss eating ice cream and listening to the juke boxes in the states?" (25 Tr. 2752).

Harris Sugiyama, a staff announcer at Radio Tokyo, heard appellant's broadcasts over the monitoring system (24 Tr. 2502-2503) and heard appellant say, in substance, "This is Orphan Ann. You must be lonely out there. Let me cheer you up with some music" (24 Tr. 2506). He also

heard her say, "It is very uncomfortable out there" (24 Tr. 2508). Sugiyama related that "the whole theme of this program was to bring out nostalgia" but he was unable positively to recall other remarks of appellant, although some sounded familiar to him (24 Tr. 2533, 2537-2538).

In the fall of 1944 George Mitsushio, chief of the Front Line Section, advised appellant that Japanese Army Intelligence had received reports to the effect that an American contingent had landed on one of the smaller islands in the South Pacific and were without water, and that his superiors at the Radio Station thought that it would be a good idea to utilize this incident on the Zero Hour program. Appellant consented to allude to this incident as a part of her regular broadcasts to the American troops, typed out a script on this matter and broadcast it. She said in substance, "O. K. Sarge, leave out the beer. Let's have some cold water. Cold water sure tastes good." Appellant repeated these words in subsequent broadcasts on at least two other occasions (10 Tr. 920-925).

Normando Reyes, a defense witness who worked on the Zero Hour with appellant, testified that on Armistice Day 1944 she broadcast that "it was time to forget about the war and remember the dead" (33 Tr. 3804-3805). Reyes also heard appellant broadcast the remarks about cold water tasting good (33 Tr. 3806, 3807).

(b) American Listener Witnesses

Exhibits 16-21 were recordings of certain Zero Hour programs which had been monitored by the Federal Communications Commission at Portland, Oregon, for a short time (16 Tr. 1627, 1638, 1646, 1691, 1694; 17 Tr. 1729, 1762-1763). Appellant's voice was on these recordings (9 Tr. 688-696a; 10 Tr. 935-946; 18 Tr. 1871-1874, 1875; 19 Tr. 1956-1970), a fact which she admitted at the trial (48 Tr. 5382).[10] The recordings were played in the presence of the

[10] For written transcript of the context of these recordings see Exhibit 25.

court and jury and members of the press through the media of playback equipment and with the use of earphones which were used for the sole purpose of improving courtroom reception and audibility (17 Tr. 1774; 18 Tr. 1954). The Zero Hour program was not nearly as audible to radio listeners in the United States as it was to the troops in the South Pacific to whom the program was beamed (17 Tr. 1772).

Gilbert Velasquez met appellant in 1927 and until 1938 frequently purchased candy from her at her family store (18 Tr. 1867-1869). In 1938 he moved away but still visited the store, made purchases, and talked to appellant about twice a month (18 Tr. 1870-1871). He was familiar with appellant's voice and positively identified it on Exhibits 16-21 (18 Tr. 1871-1875). In 1942 he was drafted into the Army (18 Tr. 1871) and while serving in the South Pacific he heard appellant's voice over the radio (18 Tr. 1875). In September 1944 he heard a broadcast in which appellant said in substance, "Joe Brown was out with Sally Smith. He is a rejectee who is getting the cream of the crop while you Joes are out there knocking yourselves out" (18 Tr. 1877). In November or December 1944 when he was on Leyte he heard her say over the radio in substance, "What are your wives and sweethearts doing?" and "Wouldn't it be nice to be home now, driving down to the park and parking and listening to the radio a while" (18 Tr. 1879). In February or March 1945 while he was still on Leyte he heard appellant broadcast to the troops in substance: "Why don't you kick in now? There's no hope. You can be treated right by the Japanese people. When the Japanese finally take over they are not going to be hard on you" (18 Tr. 1880). In December 1944, Velasquez heard her broadcast, in substance, that "the Japanese were kicking hell out of the American troops in Tacloban, and that by New Year's Day the Japanese would be in Palau" (18 Tr. 1882). Appellant also said over the air, "There is no sense in being out there in those mosquito

infested islands, perhaps getting yourselves killed'' (18 Tr. 1881).

Richard Henschel, a former signal corps officer, who interviewed appellant in the fall of 1945 (26 Tr. 2950) and whose work in producing phonograph records trained him in voice recognition (26 Tr. 2954), identified appellant's voice as one which he heard over the radio when he was in the South Pacific in 1944 and 1945 (26 Tr. 2955). He heard appellant address the troops as ''Boneheads,'' ''Dopes'' and ''Orphans'' (26 Tr. 2964), and on one occasion heard her say that ''the Japanese Imperial Command knew that there was a large convoy of ships steaming northward from New Guinea, and that the Japanese knew where they were going and had a big surprise for the personnel on board'' (26 Tr. 2959-2960). In the fall of 1944 while at Tacloban, Leyte Gulf, Henschel heard her broadcast about the loss of ships (26 Tr. 2962).[11]

Between August 1944 and September 1945, Jules I. Sutter, a former signal corps officer, listened to the Zero Hour program two or three times a week and was able to identify appellant's voice on Exhibits 16-21 as being the voice of Orphan Ann whom he had heard on the Zero Hour. In September 1944, when the witness was on Saipan, appellant broadcast that, ''The Island of Saipan was mined with high explosives, and that the Americans would be given forty-eight hours to clear off the island, and that if they did not, the island would be blown sky high'' (20 Tr. 2028). In the fall of 1944 when Sutter was still on the Island of Saipan he heard appellant broadcast in substance as follows: ''Well, are you homesick? How would you like to be sitting on your front porches right now?'' (20 Tr. 2029). After a musical number was played appellant would say in substance over the radio, ''Well, now wasn't that nice? How would you like to be dancing with your wife or girl

[11] Since this testimony was corroborative of the eyewitness testimony relating to overt act 6 upon which appellant was convicted, it is detailed herein pp. 26-29.

friend to that number?'' (20 Tr. 2029). In the early spring of 1945 appellant was heard by Sutter to say over the air: ''I wonder who your wives and girl friends are out with tonight? Maybe a 4F. Maybe someone working in a war plant making big money, while you are out here fighting, knowing you can't succeed'' (20 Tr. 2029). In March or April 1945, Sutter heard her say on the radio, in substance, ''How would you like to be sitting down to a nice big thick steak with all the trimmings'' (20 Tr. 2029). Sutter particularly remembered the last statement, because at the time the only meat he and his companions in arms had partaken of for several weeks was strong New Zealand mutton (20 Tr. 2030). In the late spring of 1945 Sutter heard appellant say, in signing off the Zero Hour program: ''Well, fellows I have to be going now. I am going to get my loving tonight. How about you?'' (20 Tr. 2030).

Lieutenant Colonel Ted Sherdeman (19 Tr. 1971), who had been in radio work for twenty years as an announcer and as a manager of radio stations (19 Tr. 1975), was an officer in charge of the Armed Forces Radio Service, and assigned to the Information and Education Section, a special staff section attached to Headquarters United States Army Forces Far East (19 Tr. 1971, 1975).

One of his duties was to make a staff study of what the Japanese radio was doing (19 Tr. 1973). He had listened to ''Orphan Ann'' on the Zero Hour program (19 Tr. 1974) and identified appellant's voice on Exhibits 16 to 21, inclusive (19 Tr. 1976, 1977). In the winter of 1944 he heard appellant say over the air, in substance ''wouldn't this be a nice night to be parked in your car with your girl and to turn on the radio?'' (19 Tr. 1977). In June 1944 while at Milne Bay he heard her identify herself over the radio as ''Ann, your friendly enemy'' (19 Tr. 1978), and say: ''Wouldn't this be a nice night to go down to the cool corner drug store and have an ice cream soda?'' (19 Tr. 1979). Late in June 1944, when in the Admiralty Islands, he listened to Radio Tokyo and heard appellant say: ''Wouldn't

you California boys like to be at the Cocoanut Grove tonight with your best girl? You have plenty of cocoanut groves but no best girls" (19 Tr. 1979).

Marshall Hoot, a former U. S. Naval Chief Boatswain's mate, identified appellant's voice on Exhibits 16-21 as that of Orphan Ann on the Zero Hour whom he heard over the radio while patrolling around the Gilbert Islands (20 Tr. 2110-2116, 2133-2136). Hoot had been alerted by Navy Intelligence to listen to the Zero Hour program (21 Tr. 2172, 2206, 2207-2209) and also knew through Intelligence and other sources that Orphan Ann and "Tokyo Rose" were one and the same (21 Tr. 2206-2207, 2189-2190). Appellant was described as "razzing us fellows out here in the Pacific telling how well Japan is getting along, and to hear her start out you would think that she was broadcasting from the United States and sorry that we were loosing (sic) so many men and ships, it sure makes the fellows sore" (21 Tr. 2204, Ex. 26). Notes on the Zero Hour program were entered in the ship's log (21 Tr. 2172-2172a).[12] In the middle of February 1944, Hoot heard appellant say, "Wake up you boneheads. Why don't you see your commanding officer and demand to be sent home? Don't stay out in that stinking mosquito infested jungle and let someone else run off with your girl friend" (20 Tr. 2118; 21 Tr. 2165). In the latter part of the same month she broadcast, "You boneheads—if you boneheads want to go home, you had better leave soon. Haven't you heard? Your fleet is practically sunk" (20 Tr. 2118-2119; 21 Tr. 2165). On another occasion (early February 1944) she said, "You know the boys at home are making the big money and they can well afford to take your girl friends out and show them a good time" (20 Tr. 2117-2118). Hoot also heard other broadcasts by appellant which were designed to create homesickness and nostalgia (20 Tr. 2117).

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[12] The vessel was later sunk by enemy action and witness did not know what became of the log (21 Tr. 2172).

William Thompson, a former marine, listened to Exhibits 16-21 and identified appellant's voice thereon as the voice of Orphan Ann which he had heard on the Zero Hour program from Radio Tokyo while he was in the South Pacific (21 Tr. 2243-2250). Between December 1943 and March 1944, while he was at Cape Gloucester, New Britain, Thompson heard appellant, broadcasting as Ann, say in substance, "Welcome to the First Marine Division, the bloody butchers of Guadalcanal, who have just landed on Cape Gloucester, New Britain" (21 Tr. 2251-2252); "Just imagine yourself with your best girl in a drivein in Southern California. You could be there if you would only give up this fruitless fight" (21 Tr. 2252), and that "the wives and sweethearts were leaving the men, service men, because you are overseas too long" (21 Tr. 2253).

Other American veterans who identified appellant's voice on the recordings testified as to propaganda which they heard broadcast by appellant. Sam Cavnar heard appellant broadcast to the fighting men in an endeavor to make them homesick (21 Tr. 2226). David Gilmore, a former marine, heard appellant stress the favorable living conditions of the civilians at home (23 Tr. 2459), and Sergeant Charles F. Hall testified concerning her broadcast of knowledge of secret troop movements (26 Tr. 2896, 2897, 2899, 2902, 2904) and her broadcasts designed to inculcate homesickness and nostalgia (26 Tr. 2892).

(c) Appellant's Admissions Concerning the Nature of Her Broadcasts

Shortly prior to Japan's surrender, the radio scripts at Radio Tokyo were burned but appellant retained about twenty-five of her own scripts (49 Tr. 5400), most of which she autographed as "Tokyo Rose" and gave voluntarily to Army Intelligence officers, war correspondents, and Army Signal Corps men after the termination of hostilities (Exhibits 22, 23, 44, 74; 13 Tr. 1356; 14 Tr. 1465; 26 Tr. 2823; 48 Tr. 5354). She also used the cognomen "To-

kyo Rose'' on other documents (Exs. 2, 14), and told one of her own witnesses that she knew she had been referred to as ''Tokyo Rose'' but felt that she was not the only one (40 Tr. 4493).

Upon being interviewed by a war correspondent, she admitted broadcasting to the troops that ''their sweethearts were unfaithful to them and that their wives were out dancing with other men while they were fighting in the muck and jungle'' (7 Tr. 486). On another occasion she told a special agent of the Army Counter Intelligence Corps that in announcing various musical recordings she would call the troops ''boncheads'' and would refer to the fact that they were ''battling'' mosquitoes (14 Tr. 1436). Appellant said she identified herself as ''Ann'' or ''Orphan Ann'' over the air (14 Tr. 1437) and when introducing a musical recording like ''Stardust'' would say ''Do you remember when you were home dancing with your wife or with your girl friend to the tune of 'Stardust'? I wonder what she is doing now?'' (14 Tr. 1436).

Appellant told Clark Lee, a war correspondent, that in the fall of 1944 at the time that Japan claimed they had sunk a number of American ships off Formosa a Major from Imperial Headquarters suggested that she broadcast the following words: ''Orphans of the Pacific, you really are orphans now. How are you going to get home now that all of your ships are sunk?'' Appellant told Lee that she broadcast those words (7 Tr. 485-486).

Appellant also testified that the Japanese did not check her scripts every day and did not make her record the program before it was broadcast (49 Tr. 5458).

9. The Overt Acts

Eight overt acts of treason were charged in the indictment. Overt Acts 1 and 2 involved discussions between appellant and others concerning proposed broadcasts. Overt Acts 5 and 7 involved the preparation of scripts by appellant for subsequent radio broadcasts. Overt Acts, 3, 4, 6

and 8 involved radio broadcasts made by appellant (1 R. 5-6).

All overt acts were submitted to the jury which returned special findings that appellant had committed Overt Act 6 with an intent to betray the United States (1 R. 255-260).

Overt Act 6 alleged that on a day in October 1944 the appellant at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships (1 R. 6-7).

The Government witnesses who testified regarding appellant's commission of Overt Act 6 were Kenkichi Oki, George Mitsushio, and Satoshi Nakamura (9 Tr. 681-682; 11 Tr. 974-976; 21 Tr. 2293-2301). Mitsushio and Oki were American born Japanese who acquired Japanese nationality and who became, respectively, Chief of the Front Line Section and Production Chief of the Zero Hour (9 Tr. 658-659; 10 Tr. 896-897). Mitsushio was responsible for the Zero Hour broadcast and was appellant's superior. In the fall of 1943, when appellant was accepted as a broadcaster for the Zero Hour program, she was told by Mitsushio that she was going to participate in a program beamed to the American Forces in the South Pacific and that its purpose was to bring about homesickness, nostalgia and war-weariness among the American fighting forces (10 Tr. 908-910). In March 1944 Mitsushio explained to the personnel of the Front Line Section, including appellant and Kenkichi Oki, that the purpose of the Zero Hour program was to create an audience among the American soldiers in the South Pacific and to broadcast propaganda designed to lower their morale, create war weariness, make them homesick, and discourage them in their fight against the Japanese (9 Tr. 661-663; 10 Tr. 911-914).

In October 1944 Mitsushio told appellant that he had a release from Imperial General Headquarters giving the results of American ship losses in one of the Leyte Gulf battles. He requested appellant to allude to these losses

in her part of the program and she agreed to do so (11 Tr. 971). Shortly thereafter Oki and Mitsushio observed appellant type a script about the loss of ships. Mitsushio received a copy of the script and noticed that she had made reference to the news announcement of the ship losses (9 Tr. 677-681; 11 Tr. 971-974). Shortly after 6 p. m. that evening appellant was present in the Broadcasting Studio of the Broadcasting Corporation of Japan in Tokyo, Japan, together with Mitsushio, Oki, and Nakamura, a Canadian-born Japanese who was master of ceremonies on the Zero Hour program. Appellant was present in the studio when the news announcer broadcast that the Americans had lost many ships in the battle of Leyte Gulf and immediately thereafter she was introduced to the radio audience by Nakamura (21 Tr. 2297-2299). Oki, Mitsushio, and Nakamura saw her speak into the microphone and heard her say, in substance: "Now you fellows have lost all your ships. You really are orphans of the Pacific. Now, how do you think you will ever get home?" (9 Tr. 681-682; 11 Tr. 974-976; 21 Tr. 2288-2289; 21 Tr. 2293-2301).

Richard Henschel, a former officer in the Signal Corps, who, because of employment in the recording business, was experienced in voice intonation, inflection, quality and comparison (26 Tr. 2953-2954), listened to appellant during an interview by war correspondents at Tokyo in September 1945 (26 Tr. 2948-2950). Henschel identified appellant's voice as that recorded on Exhibits 16 to 21, and as that of a person broadcasting as Ann which he frequently had heard over the radio in the South Pacific (26 Tr. 2951-2952, 2953, 2955-2956). On October 24th, 25th or 26th, 1944, Henschel was listening to a radio broadcast from Tokyo while he was in Tacloban, Leyte, and heard a voice which he identified as that of appellant say that "the Americans had lost all their ships in the battle of Leyte Gulf and that they were stranded in the Philippines and didn't know how they would get home" (26 Tr. 2960-2964).

Robert Cowan, a television producer and director, who as an Army sergeant talked to appellant and made a sound movie of her in October 1945, listened to Exhibits 16-21 and identified the voice of Ann and Orphan Ann recorded thereon as that of the appellant (26 Tr. 2809-2815, 2816). In the latter part of October 1944, at Orange Beach on the island of Leyte, Cowan was listening to a radio broadcast in the early evening and heard a voice which he identified as that of the appellant (26 Tr. 2816, 2818-2820). On that occasion Cowan heard appellant say, in substance, "You have been deserted. Your ships have left you. You will be driven back into the sea and annihilated by the Imperial Japanese Army and the Navy" (26 Tr. 2820).

ARGUMENT

I

The Nationality Act of 1940 Did Not Nullify the Application of the Treason Statute to the Appellant

Appellant contends (Br. pp. 37-49) that, since the Nationality Act of 1940 permits a United States citizen to surrender his citizenship and adopt that of an enemy nation, the application of the Treason Statute (18 U. S. C. Sec. 1) to the appellant violates the due process clause of the Fifth Amendment and is also unconstitutional under the treason clause of the Constitution (Art. III, Sec. 3). Her argument is that, since American citizens residing in Japan could become naturalized citizens of Japan while it was at war with this country and thereafter actively assist that country in its war against the United States without violating the treason statute, she was denied equal protection of the laws and subjected to discrimination by being prosecuted for, and convicted of treason. She also argues that, in effect, the Nationality Act of 1940 licenses treason by certain United States citizens caught in an enemy country during a war; that she was tried for "unlicensed" trea-

son, which is not a treasonable offense under the constitutional definition of treason.

Assuming, arguendo, that under the Nationality Act of 1940 a United States citizen residing abroad may become naturalized to the enemy in time of war and thereafter assist the enemy in its war effort against this country without violating the treason statute, it does not follow that those United States citizens residing in the enemy country who retain their citizenship have been denied due process of law by being subjected to prosecution for treasonous acts. It is well settled that a statute which is uniform in the obligation of all members of a legitimate class to which it is made applicable is not violative of the due process clause of the Fifth Amendment, *Pfeiffer Brewing Co.* v. *Bowles* (Em. App. 1945) 146 F. 2d 1006, cert. denied, 324 U. S. 865. The treason statute applies equally to all persons "owing allegiance to the United States" and applies to treasonous acts where ever committed. Appellant, having retained her citizenship, was one of the class of persons to whom the treason statute applied, and its enforcement as to her was in no way discriminatory.[13] She maintains that others situated the same as she escaped criminal responsibility by virtue of having exercised a privilege granted under the Nationality Act of 1940 and that she, therefore, was denied equal protection of the laws. The fact is, that she too could have expatriated herself under the Nationality Act of 1940 and thus removed herself from the category of persons to whom the treason statute applied. Those who exercised the privilege granted by the Nationality Act of

[13] Appellant's apparent suggestion (Br. p. 45) that she has been subjected to discriminatory action because certain other American-born Japanese with whom she worked at Radio Tokyo, but who became naturalized Japanese citizens, were not prosecuted for treason is without merit. Even if the persons named by appellant were to be regarded as being subject to a treason prosecution, that fact could not help appellant since it is settled that an accused person cannot defend on the ground that others are presently or have been violating the law. *Grell* v. *United States*, 112 F. 2d 861, 875 (C. A. 8); *Saunders* v. *Lowry*, 58 F. 2d 158, 159 (C. A. 5).

1940 surrendered all rights as United States citizens, and they also lost its burdens. As to them, the treason statute was no longer applicable because they were no longer persons owing allegiance to this nation. Appellant, on the other hand, did not take this course but remained a citizen of the United States and as such was bound to obey its laws regarding treason or suffer the consequences. Appellant is actually claiming that she should be accorded all the rights of a United States citizen without the necessity of bearing one of the burdens. She asks too much!

The argument that Congress has licensed treason by its enactment of the Nationality Act of 1940 (Br. pp. 46-49) is absurd. Those who travel abroad and naturalize themselves to the enemy are not licensed; they are incapable of committing treason because they are no longer persons owing allegiance to the United States.

II

Appellant Was Not Placed in Double Jeopardy, Denied a Speedy Trial, Due Process of Law, a Public Trial, or the Right to Compulsory Process.

A. Speedy Trial

Appellant makes no showing and presses no claim that she or her attorneys ever made any demand for an early trial between the date of her arrest on August 26, 1948, and the day of the trial. After her arrest on that date she was brought to the United States, taken before a United States Commissioner and indicted with reasonable promptness (within 43 days). Thereafter she obtained an order permitting one of her attorneys to travel to Japan for the purpose of taking depositions at Government expense (1 R. 164, 165, 235, 236) and obtained a continuance of the trial date to permit the completion of that task (1 R. 193-195).

Accordingly, there was no denial of a right to a speedy trial insofar as any action of the trial court or the prosecutor is concerned, since there can be no denial of that

right unless a speedy trial is demanded, *Danziger* v. *United States,* 161 F. 2d 299, 301 (C. A. 9), cert. denied, 332 U. S. 769; *Pietch* v. *United States,* 110 F. 2d 817 (C. A. 10), cert. denied, 310 U. S. 648; *Worthington* v. *United States,* 1 F. 2d 154 (C. A. 7), cert. denied, 266 U. S. 626. Nor can there be a denial of such right where the defendant has requested or acquiesced in a postponement of the trial date, *Daniels* v. *United States,* 17 F. 2d 339, 344 (C. A. 9), cert. denied, 274 U. S. 744; *United States ex rel Hanson* v. *Ragen,* 166 F. 2d 608 (C. A. 7), cert. denied, 334 U. S. 849; *Phillips* v. *United States,* 201 Fed. 259 (C. A. 8).

Nor does appellant's internment in Japan by the occupying military force shortly after the surrender constitute a basis for reversal on this ground. At that time she was detained as a security safeguard and was not held or arrested on request of the Department of Justice.[14] Despite the statement to the contrary in her brief (p. 50), appellant was not at any time held in custody by the Department of Justice during this internment. The order effectuating her release dated October 23, 1946, was executed by the military authorities in Japan and not by the Department of Justice. Moreover, the order of May 7, 1946, indicates that while appellant was not considered subject to a military trial she was being held until the results of the military investigations were transmitted to the Department of Justice for its action. Although the telegram from the War Department to the United States Army, Pacific, stated that the "Department of Justice no longer desires Iva Toguri be retained in custody," no document or other evidence was introduced or offered to show that the Department of Justice had ever requested that she be held by the military authorities up to that time. Thus the statement contained in the telegram is a conclusion and hearsay, the truth of which is absolutely uncorroborated. (Ex. N.)

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[14] The authorization of this detention and the legal basis thereof are discussed herein, *infra,* pp. 45, 49-51.

Therefore the record shows that appellant was never charged with treason by the civil authorities nor by the occupying military forces until she was arrested on August 26, 1948, and her uncorroborated testimony that she demanded a speedy trial during her internment by the military authorities cannot avail her a reversal here. Regardless of whether appellant was or was not entitled to be released from internment, her demand for a speedy trial, if her testimony is to be believed, was premature and of no legal effect, *Shepherd* v. *United States,* 163 F. 2d 974, 977 (C. A. 8). The right to a speedy trial is one that arises after a formal complaint has been lodged against a defendand in a criminal case. It is elementary that one under suspicion of the commission of a crime has no right to demand that he be prosecuted therefor. That is a matter within the determination of the prosecutor and the grand jury.

B. Double Jeopardy

Inasmuch as appellant was never tried by either a civil or military court for treason or any other offense, she was not subjected to double jeopardy. *United States* v. *Radov,* 44 F. 2d 155 (C.A. 3); *Wainer* v. *United States,* 82 F. 2d 305 (C.A. 7), affirmed, 299 U. S. 92. Confinement awaiting trail does not constitute former jeopardy, *Dixon* v. *United States,* 7 F. 2d 818 (C.A. 8); a *nolle prosequi* before trial is not a bar to another indictment for the same offense, *United States* v. *Rossi,* 39 F. 2d 432 (C.A. 9); and this court has held that the dismissal of an indictment on demurrer does not preclude a trial for the same offense under a valid indictment, *Henry* v. *United States,* 15 F. 2d 624, cert. denied, 274 U. S. 737. Moreover, the Supreme Court has held that judgment in a preliminary examination discharging an accused for want of probable cause is not conclusive and constitutes no bar to a subsequent trial in a court to which the indictment is returned, *Morse* v. *United States,* 267 U. S. 80, 85.

C. Due Process

There is no substance to appellant's argument that she was denied due process of law because the Government pressed prosecution despite the alleged loss of some Zero Hour scripts and transcripts of interceptions by the Federal Communications Commission monitoring station at Hawaii. Her whole argument is predicated upon the assumption that the foregoing evidence would have been favorable to her defense and that the Government suppressed it. In this respect there is nothing to show whether the evidence would have been favorable or unfavorable to appellant, and her argument is based entirely on speculation and not on fact. After the occupation of Japan by the Allied military forces, appellant had autographed and given away scripts of the Zero Hour program which she had in her possession. The prosecutor was able to locate some of these scripts and they were identified and introduced in evidence, over appellant's objection, as Government exhibits 22, 23, and 44.

One witness, Cowan, produced a script (Ex. 44) which had been given to him by appellant (26 Tr. 2822). He testified that his superior, Lieutenant Kaduson, had other scripts (27 Tr. 2827-2828) and that appellant had autographed various scripts and given them to other members of the motion picture crew to which Cowan was attached (26 Tr. 2837). Cowan and Kaduson were not intelligence officers but were information specialists engaged in making a sound film of appellant for the purpose of providing information for and education of military personnel (26 Tr. 2828-2829). The prosecutor had searched for these scripts but was unsuccessful in locating them (26 Tr. 3000-3001; 27 Tr. 3074-3075). Appellant's counsel was furnished Kaduson's address and had been in communication with him but did not call him as a witness (48 Tr. 5346-5347). Thus the loss of the evidence, so far as appellant is concerned, is directly attributable to her. She had the scripts

but gave them away as autographed souvenirs. Since the prosecutor sought and found other scripts which appellant had given to a news reporter of the armed forces (Ex. 22; 13 Tr. 1351-1356) and had located and introduced in evidence the scripts which appellant turned over to counter-intelligence officers (14 Tr. 1417; Ex. 23), there is no basis for any assumption that the prosecutor considered the missing scripts as being favorable to the appellant. And it follows that he was not engaged in suppressing evidence. The missing scripts were not shown to have been a part of the Government files; in fact the testimony of Cowan indicates the contrary, i.e., that they were kept by the soldiers to whom they were given as personal mementos of their wartime experiences.

The witness Roth identified two transcripts (Exs. 63 and 75) which she had made from interceptions of two Zero Hour programs while she was employed as a monitor by the Federal Communications Commission. The witness was able to identify appellant's voice and recalled that she heard that voice broadcast on these particular programs. These transcripts were introduced in evidence over appellant's objection. (52 Tr. 5846, 5858, 5879.) This witness testified on cross-examination that summaries and complete transcripts of the Federal Communications Commission intercepts were made but that the summaries were not in existence, that she did not know where the files of the complete transcripts, if any, were located (52 Tr. 5866-5868, 5870-5871, 5872, 5886-5887), and appellant did not request the prosecutor to produce any additional Federal Communications Commission transcripts, nor did she request the name and address of the person having custody of the same. A reading of exhibits 63 and 75 will indicate the probable reason for appellant's reluctance.

The remaining transcripts were Government records. The prosecutor was not suppressing them. The very presence of Miss Roth on the witness stand is evidence of that

fact. Since the two transcripts introduced in evidence contained material which was obviously propaganda, there is no reason to assume that other transcripts would be different in their nature. Moreover, there is no assurance that the witness could definitely recall that the voice identified as that of appellant participated in other programs. In the case of exhibits 63 and 75 she had an independent recollection of the event and of hearing appellant's voice.

Moreover, the fact that evidence is no longer available is no defense to a criminal action. Witnesses die and physical evidence is lost or deteriorates. The prosecutor is not an insurer, nor is he bound to collect evidence for the defense. The preparation of the defense is the function of the defense lawyer—not the prosecutor. This is not a case of using evidence known to be perjured and it cannot be blown up into a great issue of suppressing evidence which might exculpate the appellant.

D. Public Trial

Appellant's objection that she was denied a public trial because earphones were not provided for the spectators in the courtroom (Br. pp. 226-227) was largely disposed of in *Gillars* v. *United States,* 182 F. 2d 962, 977 (App. D. C.). In addition to the facilities provided for the court, court clerk, court reporter, jury, and counsel, a number of sets of earphones were installed for the press, making a total of 40 sets of earphones installed in the courtroom (19 Tr. 2017, 2018; 17 Tr. 1766, 1797). At the time the records were introduced in evidence an expert radio engineer had testified that the recordings were not of such quality as to be readily intelligible over a loud speaker but that they could be reasonably understood if headphones were used (17 Tr. 1773-1774, 1795). Special equipment of a professional type was installed in order to play the recordings (17 Tr. 1765-1766).

Thus listening facilities were available for the use of the appellant, her counsel, the court, its attaches, the jury, and

the members of the press. No one was excluded from the courtroom. Furthermore, a written transcript of the recordings (Exs. 16-21) was placed in evidence as Government's exhibit 25 and was therefore available as a part of the public record of the trial (19 Tr. 2015; 17 Tr. 1811-1812, 1813, 1814, 1819).

This court has held in situations analagous to the one at bar that there is no denial of a public trial where spectators have been excluded from the courtroom, but litigants, witnesses, jurors, counsel for the defendant and prosecution, officers of the court, members of the bar and representatives of the press were allowed to remain, *Reagan* v. *United States,* 202 Fed. 488 (C.A. 9); *Callahan* v. *United States,* 240 Fed. 683 (C.A. 9). The withholding of an income tax return from general publicity by placing it in the secret files of the court did not constitute a denial of a public trial, *Gibson* v. *United States,* 31 F. 2d 19 (C.A. 9), cert. denied, 279 U. S. 866. And in *Steiner* v. *United States,* 134 F. 2d 931, 934 (C.A. 5), cert. denied, 319 U. S. 774, it was held that there was no denial of a public trial where numerous brief arguments were made at the bench out of the hearing of the jury and the public.

Moreover, the phonograph recordings were exhibits and it is recognized that exhibits are not passed around among spectators in the courtroom. Failure to do so has never been suggested as constituting a denial of a public trial.

E. Compulsory Process

On March 1, 1949, appellant filed several motions, in the first of which she requested the court to issue subpoenas to certain witnesses, 43 in number, residing abroad requiring their attendance at the trial at the expense of the Government (1 R. 117-118, 130-164). Except for certain high ranking Army officers, only one person named in her list of witnesses was alleged to be a United States citizen

(1 R. 124-125, 133-164).[15] The seventh motion requested that, in the event of the denial of the previous motions, the court enter an order providing for the taking of depositions at Government expense of witnesses residing abroad (1 R. 122-123). The court denied the first motion (1 R. 166) but granted the seventh (1 R. 167) and ordered that the Government defray the expense of taking depositions abroad and allowed appellant's attorney travel and subsistence expenses for that purpose. Moreover, with the consent of the Government, in the form of a written stipulation, appellant was granted the right to take depositions not only from the persons named in her motions but from such other persons as she deemed necessary. (1 R. 168-169, 171-172.) At a later date a supplemental order was entered increasing the expense allowance of appellant's counsel to cover the additional time he spent in Japan (1 R. 227, 235).

Thus appellant requested not only compulsory process requiring the appearance in the United States of persons residing in a foreign country but she also asked that the Government bear the expense of transporting and maintaining these witnesses. She was entitled to neither as a matter of right.

The process of United States courts does not extend to persons residing in a foreign country unless such persons are United States citizens. *United States* v. *Best,* 76 F. Supp. 138, 139, aff'd, 184 F. 2d 131 (C.A. 1); *United States* v. *Hoffmann,* 24 F. Supp. 847, 848. Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena, since they owe no allegiance to the United States. *Cf. Blackmer* v. *United States,* 284 U. S. 421. This fact is recognized by the Congress, since 28 U.S.C. (Rev.), Section 1783, provides in part:

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[15] Appellant did not offer at the trial, the deposition of any person residing abroad who she had alleged to be a United States citizen in her motion of March 1, 1949. Compare list of depositions (1 R. VIII, XI) with the list of persons whom she requested the court to bring to the United States at Government expense (1 R. 124-125, 133-164).

> a. A court of the United States may subpoena for appearance before it, *a citizen or resident of the United States who:* * * * [Italics supplied.]

Furthermore the constitutional provisions guarantee only the right to the issuance and service of process and do not include the right to have the expenses paid by the Government, *Wallace* v. *Hunter,* 149 F. 2d 59, 61 (C. A. 10). And the question of whether the Government shall pay the fees and expenses of defense witnesses is one which is addressed to the sound judicial discretion of the trial court, *Meeks* v. *United States,* 179 F. 2d 319 (C. A. 9); *Dupuis* v. *United States,* 5 F. 2d 231 (C. A. 9); *Casebeer* v. *Hudspeth,* 121 F. 2d 914 (C. A. 10), cert. denied, 316 U. S. 683; *Brewer* v. *Hunter,* 163 F. 2d 341, 342 (C. A. 10). The Supreme Court has ruled that it will not review the exercise of such discretion, *Goldsby* v. *United States,* 160 U. S. 70; *Crumpton* v. *United States,* 138 U. S. 361.

Appellant was not deprived of the testimony of the persons named in her motion and accompanying affidavit, since the court entered an order permitting the taking of depositions and providing that the expense incident thereto be borne by the Government.[16] The testimony of such persons was obtained and used by her attorney at the trial, although it developed that much of it was inadmissible for various reasons.

III

The District Court Had Jurisdiction

Appellant maintains that the military authorities violated the so-called "Posse Comitatus Act," Act of June 18, 1878, 20 Stat. 152 [10 U. S. C. Sec. 15 (1945 Ed.)][17] by trans-

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[16] It should be noted that despite her plea of poverty, appellant had access to sufficient funds to send an investigator to Japan to accompany her attorney, and to bring two witnesses from Australia (30 Tr. 3395; 37 Tr. 4215-4216, 4218-4219; 51 Tr. 4721).

[17] This act is set out verbatim in Appendix A. It is also quoted in the *Chandler* case at page 936.

porting her from Japan to San Francisco on an Army transport in custody of a military guard at the request of the Department of Justice. She contends that such return to the United States does not constitute "being brought" within the meaning of 18 U. S. C. Section 3238 [1948] (Br. p. 58).

Appellant's argument in this respect is first predicated upon the unwarranted assumption that 10 U. S. C. Section 15 was violated. This point was raised in *Chandler* v. *United States,* 171 F. 2d 921, 936 (C. A. 1), cert. denied, 336 U. S. 918, and again in *Gillars* v. *United States,* 182 F. 2d 962, 972-973 (App. D. C.). In both cases the Court of Appeals held that the "Posse Comitatus Act" has no application to occupied enemy territory where the military power is in control and Congress has not set up a civil regime.[18]

Furthermore, as the *Gillars* case points out: "The court was not required to refuse to try her when she was in fact here, even assuming for the present purposes that she was brought here unlawfully. *Chandler* v. *United States, supra,* and cases cited 171 F. 2d at page 934. See also *Pettibone* v. *Nichols,* 1906, 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1947; *In re Johnson,* 1896, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103; *Cook* v. *Hart,* 1892, 146 U. S. 183, 13 S. Ct. 40, 36 L. Ed. 934; *Mahon* v. *Justice,* 1887, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283; *Ker* v. *Illinois,* 1886, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421."

In a Federal criminal removal proceeding brought within this circuit, Judge Neterer said: ". . . the mere fact, and if true, as stated in the petition, that the defendant was kidnaped from British Columbia, would not give this court power to examine such fact, and, if true, release the de-

[18] The correctness of that holding is apparent when it is recalled that the act (10 U. S. C. § 15) represented the termination of a long struggle to put an end to that aspect of reconstruction which employed Federal troops to police State elections in States in which the civil power had been reestablished. Its history has been ably recounted by Lieber in *The Use of the Army in Aid of the Civil Power,* War Department Document No. 64, Office of the Judge Advocate General, Government Printing Office, 1898; *Chandler* v. *United States, supra.*

fendant," *United States* v. *Unverzagt,* 299 Fed. 1015, 1018 (W. D. Wash.), aff'd sub nom. *Unverzagt* v. *Benn,* 5 F. 2d 492 (C. A. 9), cert. denied, 269 U. S. 566.

Accordingly, appellant's contention is without merit.

IV

The Evidence Was Sufficient to Establish Appellant's Guilt

Appellant maintains that the judgment of conviction should be reversed and judgment of acquittal entered on the ground that her intent to betray the United States was not established beyond a reasonable doubt (Br. pp. 54-57). Her argument is that uncontradicted testimony that she gave assistance to certain allied prisoners of war was sufficient as a matter of law to create a reasonable doubt concerning her intent to betray.

In determining whether a case should be reversed on the ground of insufficiency of the evidence, the rule is that the evidence is to be considered in the light most favorable to the Government, *O'Leary* v. *United States,* 160 F. 2d 333 (C. A. 9); *Canella* v. *United States,* 157 F. 2d 470 (C. A. 9); *Borgia* v. *United States,* 78 F. 2d 550, 555 (C. A. 9), cert. denied, 296 U. S. 615.

In so considering the evidence, an appellate court will indulge all reasonable presumptions and will draw all inferences permissible from the record, *Henderson* v. *United States,* 143 F. 2d 681 (C. A. 9). Moreover, a reversal will be granted only if there is no substantial evidence to support the verdict, *Craig* v. *United States,* 81 F. 2d 816, 827 (C. A. 9), cert. denied, 298 U. S. 690; *Jelaza* v. *United States,* 179 F. 2d. 202 (C. A. 4).

Curley v. *United States,* 160 F. 2d 229 (App. D. C.), cert. denied, 331 U. S. 837, upon which appellant relies (Br. pp. 55-56), points out that the trial court must submit the issues to the jury if a reasonable mind might fairly have or not have a reasonable doubt as to the defendant's guilt. It is

only where the court concludes that there *must* be a reasonable doubt in a reasonable mind that it may direct a verdict. However, this court has not, as yet, adopted even this view. It has been held here that "the reasonable doubt which often prevents conviction must be the jury's doubt, and not that of any court, either original or appellate," *Craig* v. *United States,* 81 F. 2d 816, 827, cert. denied, 298 U. S. 690.

It will be observed that appellant's "Detailed Statement of Facts" and argument make no reference whatsoever to the Government's evidence relating to the issue of intent. We have sought to remedy that oversight in the summary of facts set forth herein, *supra* pages 3-39. When the Government's evidence is considered in toto there can be but one answer to the question of whether appellant intended to adhere to the enemy. Of course she did! What other possible answer is there to the act of an American citizen who, in time of war, broadcasts propaganda for the enemy, from enemy country, for pay, for the purpose of weakening the will of American troops to fight and to create homesickness, nostalgia, and war-weariness among those soldiers? Such a person makes herself a part of the enemy's propaganda machine. She does so for hire in order to feather her own nest and actively works toward the end in view.

Every court which has ever considered the propaganda broadcast situation has held that a citizen in the pay of the enemy who broadcasts propaganda for them is guilty of treason, *Joyce* v. *Director of Public Prosecutors* (1946) A. C. 347; *Chandler* v. *United States,* 171 F. 2d 921, 942-944 (C. A. 1), cert. denied, 336 U. S. 918; *Gillars* v. *United States,* 182 F. 2d 962, 971 (App. D. C.); *Best* v. *United States,* 184 F. 2d 131, 137 (C. A. 1).

Thus, when appellant worked as a paid broadcaster for Radio Tokyo on the Zero Hour, knowing it was acting as a propaganda arm of the Imperial Japanese Government and knowing the aims and purposes of the program, she gave

aid and comfort to the enemy. For it has never been doubted that, "when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, *is directly in furtherance of their hostile designs,* gives them aid and comfort," *Charge to the Grand Jury,* 1 Bond 609, 611, Fed. Cas. No. 18272; 30 Fed. Cas. at 1037 (C. C. S. D. Ohio). [Italics supplied.]

Here appellant's broadcasts emanated from the enemy country and were directed as weapons at the armed forces of the country to which appellant owed allegiance. She was hired for the precise purpose of broadcasting sentimental music interspersed with comments designed to cause homesickness and war-weariness among the listening audience. Even apart from what appellant said or broadcast, her participation in the operations of the program, which was proved to be a part of the enemy's war machine, amounts to an adherence to that enemy. The Japanese considered that she gave them aid and comfort; why should any court categorically declare the contrary?

The record fully discloses the interest and control of the Imperial Japanese Government in the Zero Hour program. It discloses the aim and purpose of the program and the manner in which they were to be achieved. Appellant's knowledge of all this was abundantly proved, her participation in it as a paid employee was more than proved, it was admitted. The attitude with which she accepted this employment was adequately summed up in her own statements to others that she liked the work because the pay was good, the hours shorter, the work interesting, the contacts and surroundings enjoyable, and there might be a future in it.

The nature of the songs and comments broadcast by appellant was proved by those who were present when she broadcast and by those who heard the program over the short wave radio while fighting the Japanese in the South Pacific. The songs and comments attributed to her fit hand-in-glove into the propaganda theme arranged by the Japa-

nese Government. The music was sentimental; the comments sometimes taunting, sometimes fear-inspiring, but mostly nostalgic reminders of the good times back home. Nor did appellant omit the divide-and-conquer technique, since she frequently reminded her listeners of the good pay and infidelity of those back home.

Yet in spite of all this, appellant has the temerity to argue that because she gave assistance to certain allied prisoners of war (who collaborated with her in her work at Radio Tokyo) there was insufficient evidence of her intent. (She casts her contention in terms of reasonable doubt, but even on that basis her argument must fall.) The assistance appellant afforded the prisoners certainly cannot entirely neutralize all the other evidence in the case. It does not necessarily follow that her humanitarian acts were related to intent. She could have been motivated by other reasons: pity, friendship, gratitude, or affection. None of these would bear upon her intent to adhere to the enemy.

Tested by the legal principles set forth above, it is readily perceived that there was sufficient evidence to justify her conviction of treason. It is not the function of this court here to weigh the evidence or judge the credibility of the witnesses—those are jury functions—but only to ascertain whether the evidence suffices, *Craig* v. *United States, supra.*

V

Admissibility of Government's Evidence

A. Written Admissions of Appellant

Appellant contends that exhibits 2, 15, and 24 were not admissible in evidence under the rule announced by the Supreme Court in *McNabb* v. *United States,* 318 U. S. 332, and subsequent cases (Br. pp. 138, 145, 147). She also argues that the Government failed to lay a preliminary foundation of voluntariness as to these exhibits and that they were inadmissible for that reason (Br. pp. 140, 141,

147). As to exhibits 2 and 15, she maintains that the evidence shows that they were obtained by coercion and inducement and were therefore inadmissible (Br. pp. 143, 147).

1. STATEMENT OF FACTS

On September 6, 1945, a message prepared jointly by the Department of State, the War Department, and the Navy Department and approved by the President was transmitted to General MacArthur through the Joint Chiefs of Staff.[19] As Supreme Commander for the Allied Powers, General MacArthur was directed to exercise his authority as he deemed proper to carry out his mission and to act directly and with such measures, including the use of force, as he deemed necessary. It was made clear that his authority was supreme. On September 10, 1945, the Commander in Chief, Army Forces of the Pacific (CINCAFPAC), through its Adjutant General, authorized the commanding generals of the forces under General MacArthur's command to apprehend and detain citizens and nationals of the United Nations who were suspected of treason and persons who might constitute a threat to the security of the military forces occupying Japan (Ex. P).

Appellant was apprehended and interned October 17, 1945, pursuant to the authority contained in the order of September 10, 1945 (Ex. N). On May 1, 1946, appellant's case record was transmitted to the Adjutant General, War Department, Washington, D. C., for reference to the Department of Justice or other interested Government agencies (Ex. N).

Exhibit 2 was a yen note autographed by the appellant with her signature and the words "Tokyo Rose" and given by her as a souvenir to a guard at Yokohama Prison in October 1945 (1 Tr. 35-36). Appellant was not molested by the guard (1 Tr. 47), who was unarmed (1 Tr. 48, 50, 51;

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[19] See 13 Department of State Bulletin 480, September 30, 1945, Vol. XIII, No. 327. A copy is printed in Appendix B.

2 Tr. 92), and she gave the exhibit voluntarily and without any preliminary refusal (1 Tr. 51). Appellant wrote the words "Tokyo Rose" on the yen note of her own accord and not at the request or suggestion of the guard (1 Tr. 54). The witness obtained the appellant's autograph by his own personal request and not as the result of any governmental order (2 Tr. 95-96).

Exhibit 15 consisted of notes taken by a famous war correspondent, Clark Lee, for International News Service, during an interview with appellant in a hotel room in Tokyo immediately after the Japanese surrender and before appellant was apprehended or detained by the occupying military force. Appellant's husband, Lesli Nakajima, a friend of appellant, and Harry Brundidge, another newspaper correspondent, were present (7. Tr. 478-479, 482-483). Lee related the substance of his conversations with appellant (7 Tr. 481-488). Lee wore a khaki shirt and trousers, a baseball cap, and a United States war correspondent's badge (7 Tr. 491-492). Although Lee was armed he did not wear his gun in the hotel room but took it off and laid it on a table or hung it in a closet (7 Tr. 516, 532-533). Appellant and her husband came to the hotel in the company of Nakajima (7 Tr. 515). Lee and Brundidge were trying to get an interview; it was not a confession or a legal document of any kind (7 Tr. 521). Lee and Brundidge had offered her $2,000 for an exclusive contract in writing her story (7 Tr. 522), and appellant told them she was the only "Tokyo Rose" (7 Tr. 522-525, 557).

During the interview the door was "very likely" locked because the story was considered of importance in the profession and Lee and Brundidge did not want any other correspondent to walk into the room during the interview (7 Tr. 531). Lee testified that appellant's husband did not appear to be frightened and that he had no reason to be frightened and that as to appellant, "there was no atmosphere of tension or threat or anything of the sort at all" (7 Tr. 537). There were several interruptions, they had

"tea and cigarettes and things of that sort" (7 Tr. 538, 539). Appellant was not held in detention (8 Tr. 601). Lee was an experienced newspaper reporter who took notes in the interest of accuracy (8 Tr. 603) and told appellant he was a reporter and war correspondent (8 Tr. 604) and was not representing the United States Government (8 Tr. 605).

In March 1948 appellant was living with her husband in Tokyo, having been released from detention 18 months previously by the military authorities. She was requested by the military authorities, acting for Mr. John B. Hogan, an attorney in the Department of Justice, to talk with Mr. Hogan at Army headquarters, and an Army vehicle was sent to bring her downtown because of a stoppage in the transit system in Tokyo at that time (8 Tr. 610, 618, 621-622). Appellant met Hogan and Brundidge, who had accompanied him to Tokyo in an unofficial capacity (8 Tr. 630), in a reception room in the Dai Iti Building (8 Tr. 610). Appellant was interviewed there in the presence of a female receptionist (8 Tr. 610, 631-632; 47 Tr. 5217). Hogan identified himself and told appellant she was being investigated for treason and might be prosecuted (8 Tr. 610-611). He also advised her that anything she said or signed could be used against her (8 Tr. 613, 624-625).

Appellant read Lee's notes, acknowledged them to be an accurate account of what she said at the original interview, and signed her name to them (8 Tr. 611-612).[20] She was not threatened or coerced in any way (8 Tr. 613).

Exhibit 24 was a written statement signed by appellant and given to Federal Bureau of Investigation Agent Fred Tillman. Appellant was interviewed by Tillman in the visitors' room at Sugamo Prison on April 29 and 30, 1946. Tillman identified himself as a special agent of the Federal

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[20] Appellant states that Hogan asked her if she would "dare" to sign exhibit 15. This was based upon a typographical error in the transcript which has since been corrected with consent of appellant's counsel. The correct statement of Hogan's testmony is that he asked her if she "cared" to sign the exhibit (see order of this court dated October 12, 1950, correcting the record).

Bureau of Investigation, told her what he wanted to discuss, that she was not required to make a statement, that any statement she might make could be used against her, and that she had a right to counsel. The interview began in the morning and terminated at 4 p. m., with an intermission for lunch. There was no door on the room in which the interview took place and guards and others had access thereto to ascertain that the prisoner was still there. The substance of the interview was reduced to writing in the form of exhibit 24, and appellant read it, made corrections, initialed each page, and signed it in the presence of Tillman and a soldier. No threats or promises were made to appellant by Tillman, and he did not exert any duress or coercion upon her. She spoke freely and voluntarily. (14 Tr. 1448-1457, 1462; 15 Tr. 1497-1498, 1472-1483.) During the interviews appellant was not in the custody of Tillman but remained in the custody of Army guards who were responsible for her custody and safety (Ex. 0). The interviews were of short duration.[21]

2. THE SO-CALLED McNABB RULE

The evidentiary rule announced by the Supreme Court in *McNabb* v. *United States,* 318 U. S. 332, and subsequent cases has no application to the case at bar because the statute and rule of Federal criminal procedure upon which the evidentiary rule rests have no application to military action abroad and because appellant's internment by the Supreme Commander for the Allied Powers in Japan was in accordance with his authority and the laws of war.

It is well to remember that appellant did not at any time during the trial of this cause object to the introduction of any exhibit or any oral testimony on the ground that the evidence was obtained in violation of the rule laid down in the *McNabb* case. Thus, the trial court was not afforded

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[21] Exhibit O, introduced by appellant, shows that on April 29, 1946, appellant talked with Tillman from 10 a. m. until 11:50 a. m.; on April 30, 1946, she was interviewed from 9:30 a. m. until 11:40 a. m., and from 2:25 p. m. until 4:05 p. m.

an opportunity to pass upon the present contention, and the possibility of the application of the *McNabb* rule was not brought to his attention during the trial. At the time of the trial this rule of evidence had been in effect over six years. It is suggested that appellant's present contention comes too late.

Appellant's status is different from that of a person arrested by civil authorities in the United States for the commission of a criminal offense. Between October 17, 1945, and October 25, 1946, she was detained as a security safeguard by the occupying military force in Japan pursuant to their own regulations. She had not been apprehended upon the complaint or instigation of the civil authorities and she was not charged with treason or any offense.

Appellant was an occupant and resident of a country occupied by a superior military force by virtue of an unconditional surrender by the enemy government. The commander of that military force, General MacArthur, was and still is the Supreme Commander for the Allied Powers and therefore a representative of the Allied Powers and not of the United States alone, *Hirota* v. *MacArthur*, 338 U. S. 197. Such an occupying military force is, in all respects, supreme. It may exercise all the powers given by the laws of war, and its principal object in administering an occupied area is to provide for the security of the invading army.[22] By the message of September 6, 1945, General MacArthur, as Supreme Commander for the Allied Powers, was empowered to exercise his authority as he deemed proper to carry out his mission and to use such measures as he deemed necessary. The authority to establish internment compounds and to intern persons constituting a threat to the security of our forces was specifically delegated by General MacArthur to the generals under his command by the telegram of September 10, 1945 (Ex. P). Suspected traitors

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[22] See War Department Basic Field Manuel, Vol. VII, Part 2, Rules of Land Warfare, §§ 282, 286.

were specifically mentioned. Thus General MacArthur and his subordinates were acting under the law of the military, the law of war, and his use of that law and power had been ratified by this Government. We, therefore, do not look to the civil laws of either the conquering or the conquered country for the authority to govern the conquered territory, but to the law of war, whose supremacy is essential for the protection of the officers and soldiers of the Army, *Dow* v. *Johnson,* 100 U. S. 158, 170; *Dooley* v. *United States,* 182 U. S. 222, 230; *Madsen* v. *Kinsella,* 93 F. Supp. 319, 323 (S. D. W. Va.).

Two recent treason prosecutions have affirmed this power. In *Gillars* v. *United States,* 182 F. 2d 962 (App. D. C.), the court said (p. 972):

> The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war and flows directly from the right to conquer. We, therefore, do not look to the Constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Dooley v. United States, 1900, 182 U. S. 222, 230. 21 S. Ct. 762, 765, 45 L. Ed. 1074, quoting Halleck on International Law, Vol. II, page 444. See, also, MacLeod v. United States, 1912, 229 U. S. 416, 425, 33 S. Ct. 955, 57 L. Ed. 1260.

And in *Best* v. *United States,* 184 F. 2d 131 (C. A. 1), the court held that the search of Best's apartment in Vienna and the seizure of certain documents therein were not unreasonable in view of the military situation at the time.

The defense exhibits N, O, and P conclusively prove that appellant was detained by the occupying military force pursuant to its own regulations which were designed to protect

the security of that force and to ferret out and punish those guilty of war crimes.

The apprehension and internment of appellant was a reasonable exercise of the military power. She was a person trained to write and broadcast propaganda designed to create nostalgia and homesickness among the troops of the occupying nation. She was a suspected traitor, a person who had gone over to the other side and worked for them. To allow her to remain at large might be dangerous to the occupying forces, since she possessed a capability of spreading discontent among the occupying forces and also of fomenting disorder and unrest among the population of a country whose military forces preferred death to surrender. In those early days of the military occupation of Japan the temper and qualities of resistance of the conquered people could not be anticipated or gauged, and the internment of those capable of agitating the masses was certainly the safest course to pursue. In its setting, therefore, the internment of appellant was not unreasonable.

In addition to the law of war, the war power conferred by the Constitution carries with it its inherent power to guard against the renewal of the conflict, *Stewart* v. *Kahn,* 78 U. S. 493, 507; *In re Yamashita,* 327 U. S. 1, 12, and to punish offenders of the laws of war, *Ex parte Quirin,* 317 U. S. 1.

While Congress has recognized the necessity for the use of military commissions in order to preserve their traditional jurisdiction, it has not prescribed any rules or enacted any laws governing their procedure, nor has it enacted any laws pertaining to the government of occupied territory.

The so-called *McNabb* rule does not rest upon any constitutional ground; it is a rule of evidence now based on Rule 5(a), Federal Rules of Criminal Procedure, and was adopted to implement and render effective the basic policy which the Court found to underlie that rule and a Federal

procedural statute, now repealed,[23] *McNabb* v. *United States,* 318 U. S. 332. The *McNabb* case and *Upshaw* v. *United States,* 335 U. S. 410, as well as others decided in accordance with the doctrine there laid down, leave no doubt but that the exclusionary features of this rule of evidence are predicated upon the willful violation of the procedural requirements of 18 U. S. C. § 595 (1946) or its successor, Rule 5(a), Federal Rules of Criminal Procedure. As presently interpreted by the Supreme Court, by this circuit, and by other Federal courts of appeal, the rule of the *McNabb* case is not one of absolute exclusion voiding any confession obtained from a person not immediately taken before a committing magistrate, *United States* v. *Mitchell,* 332 U. S. 65; *Symons* v. *United States,* 178 F. 2d 615 (C. A. 9), cert. denied, 339 U. S. 985; *Chevillard* v. *United States,* 155 F. 2d 929, 935-939 (C. A. 9); *Garner* v. *United States,* 174 F. 2d 499 (App. D. C.), cert. denied, 337 U. S. 945.

The former procedural statute and Rule 5(a), Federal Rules of Criminal Procedure, do not apply to the conduct of the military force occupying Japan; they apply only to arrests made by civil officers in the United States for civil offenses.

Nor can the policy underlying the *McNabb* rule be applied to the situation here presented. Appellant seems to suggest that the policy could be predicated upon an Article of War (Br. p. 139),[24] but those Articles apply only to the classes of persons specified in Article 2.[25] In general, the persons enumerated in that Article are members of our own Army and of personnel accompanying the Army. Appellant is

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[23] 18 U. S. C. § 595 (1946 Ed.), upon which the *McNabb* rule originally rested, was repealed when Title 18 U. S. C. was revised September 1, 1948, because that section had been superseded by Rule 5(a) F. R. Crim. P., which became effective March 31, 1946.

[24] It is noted in passing that this court has held in *Kronberg* v. *Hale,* 180 F. 2d 128, cert. denied, 339 U. S. 969, that the 70th Article of War relating to the furnishing of charges is not mandatory but discretionary.

[25] 10. U. S. C. § 1473.

not such a person.[26] The Supreme Court has held that the procedural rules contained in the Articles of War are not applicable in the trial by a military commission of an enemy commander for war crimes, *In re Yamashita, supra.* In that case the Court said (p. 20):

> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

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[26] *Madsen* v. *Kinsella,* 93 F. Supp. 319, 325-327 (S. D. W. Va.).

If the actions of military tribunals in Japan are not reviewable by courts of the United States, *Hirota* v. *MacArthur,* 338 U. S. 197; *Toneo Shirakura* v. *Royall,* 89 F. Supp. 713, then the internment of appellant by the allied military force in Japan pursuant to the power conferred by the laws of war is not subject to the procedural rules of 18 U. S. C. § 595 or the succeeding rule of criminal procedure.

EXHIBIT 2

It is obvious that the *McNabb* rule is not applicable to exhibit 2 not only for the reasons set forth above but also because this exhibit was only an autograph given by appellant to one of her guards as a souvenir. It was not introduced as an admission on her part but only as a proved specimen of her handwriting to be used for purposes of comparison. The situation is thus entirely different from *McNabb,* which deals with confessions of guilt obtained by police or investigators during a detention in violation of a rule or statute requiring speedy arraignment.

EXHIBIT 15

The contention that appellant's signature on exhibit 15 was obtained in violation of the *McNabb* rule is founded upon the theory that appellant was under arrest when she went to see Hogan on March 26, 1948. This theory is without any factual basis. At that time appellant was not under arrest and she was not being detained; nor was she under arrest or detention at the time of her original interview with Lee and Brundidge. She had voluntarily appeared for this interview as the result of a request and was not arrested or detained against her will, and the circumstance that she came by Army vehicle is of no consequence, since it appears that such method of transportation was a courtesy extended to her for her convenience due to a tie-up of the transportation system in Tokyo at that particular time. At this time appellant was living at home with her husband; she came from there and returned there after her interview with Hogan.

EXHIBIT 24

While there is no doubt that appellant executed exhibit 24 during an interview with Special Agent Tillman while she was interned by the occupying military force in Japan, the policy announced in the *McNabb* and *Upshaw* cases does not apply. Appellant was not arrested and charged with a crime. She was an internee. She was not held in violation of any statute, rule, or Article of War requiring arraignment or the entering of a formal charge. The internment was in accordance with the power of the occupying military force to preserve the safety of its troops and to prevent disturbances. Thus there is a complete absence of the factual foundation which is required to bring into operation the rule in the *McNabb* case. In short, there is nothing upon which to base the rule.

Appellant's situation is analogous to that of an accused who has been legally committed to jail in default of bail or for a nonbailable offense. A voluntary confession obtained from one legally committed to jail is admissible in a criminal trial, *United States* v. *Gottfried,* 165 F. 2d 360 (C. A. 2), cert. denied, 333 U. S. 860; *McNabb* v. *United States,* 142 F. 2d 904 (C. A. 6), cert. denied, 323 U. S. 771.[27]

3. APPELLANT EXECUTED EXHIBITS 2, 15, AND 24 VOLUNTARILY.

Exhibits 15 and 24 contained certain admissions by appellant which related to the issues on trial, but appellant did not acknowledge guilt of the crime of treason.[28] On the contrary,

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[27] At the second trial of McNabb, the Government introduced satisfactory proof that the defendants had been brought before a committing magistrate promptly after their arrest and before questioning. It appeared, therefore, that at the time they made their confessions the McNabbs were being held in default of bail after arraignment before the magistrate. The confessions were again admitted, the defendants again convicted, and the convictions affirmed.

[28] Exhibit 2 contains only appellant's signature and the words "Tokyo Rose." It was, therefore, not strictly an admission but rather a proved specimen of appellant's handwriting and signature admissible under 28 U. S. C. § 1731 (1948 Ed.) for comparison with other signatures on exhibits which were to be offered later. It was in fact offered for that limited purpose (1 Tr. 36).

she sought to avoid guilt of any crime and to exculpate herself. The statements were, therefore, admissions and not confessions, and the rules governing their reception in evidence are much less onerous than those concerning confessions, *Dimmick* v. *United States,* 116 Fed. 825, 831 (C. A. 9), cert. denied, 189 U. S. 509; *Ercoli* v. *United States,* 131 F. 2d 354, 356 (App. D. C.); *Gulotta* v. *United States,* 113 F. 2d 683 (C. A. 8).

(a) Preliminary Proof

In her brief appellant makes no showing that she ever objected to the admission of these exhibits in evidence upon the specific ground that the Government had failed to prove their voluntary character; nor does she point to any specific attempt to obtain a ruling by the trial judge at any time as to the voluntary character of these exhibits. Thus appellant has failed to comply with Rule 20(2)(d) of the rules of this court. However, although it is doubtful whether, under the decisions of this and other Federal courts of appeal, the Government was required to offer preliminary proof of the voluntary character of appellant's admissions in the situations here presented, *Gray* v. *United States,* 9 F. 2d 337 (C. A. 9); *Ah Fook Chang* v. *United States,* 91 F. 2d 805, 809 (C. A. 9); *Hartzell* v. *United States,* 72 F. 2d 569 (C. A. 8), cert. denied, 293 U. S. 621; *Murphy* v. *United States,* 285 Fed. 801 (C. A. 7), cert. denied, 261 U. S. 617; *United States* v. *Johnson,* 76 F. Supp. 542, 548, aff'd in part, 165 F. 2d 42, cert. denied, 332 U. S. 852 (opinion by Judge Fee sitting in Middle District, Pennsylvania); *Wigmore,* 3rd Ed., § 860, the Government in fact made such proof as to exhibits 15 and 24. Exhibit 2 was shown by appellant's cross-examination to have been given voluntarily to the witness through whom it was introduced. Hogan's entire testimony, taken as a whole, indicates the voluntary character of the interview and the execution of exhibit 15. Prior to the introduction of this exhibit he specifically testified that she had appeared upon request; that he had told her

she was being investigated, might be prosecuted for treason, and that anything she said or signed could be used against her; that she was not threatened or coerced; and that she read the notes, acknowledged their accuracy, and signed them.

Tillman likewise testified prior to the admission of exhibit 24 in evidence, that he had identified himself to appellant and told her what he wanted to discuss, that she need not talk to him, that she had a right to counsel, and that any statement she made could be used against her. He testified that no threats or promises were made to her, that he did not exert any duress or coercion upon her, and that she spoke freely and voluntarily. Appellant makes no reference to any testimony tending in any way to refute or controvert this testimony.

As to exhibit 2, the defense brought out on cross-examination the fact that appellant had executed the exhibit voluntarily and without any preliminary refusal, that she was not molested, and that she wrote the words "Tokyo Rose" of her own accord and not at the guard's request or suggestion. This was sufficient to render the exhibit competent, since this court has held that a statement made by a defendant may be shown to be free and voluntary subsequent to the admission of the statement in evidence, *Johnstone* v. *United States,* 1 F. 2d 928 (C.A. 9).

(b) The Facts Show That the Exhibits Were Executed Voluntarily.

Appellant does not assert that exhibit 24 was involuntarily obtained by means of inducements or coercion.

The Government had nothing to do with the original interview between appellant and Clark Lee and Brundidge. They were newspaper correspondents, not soldiers, and appellant had entered into a contract with them whereby she would profit by giving them the exclusive rights to the story of her experiences. She had not been arrested or detained by the military authorities at that time. This is not altered by the fact that Lee and Brundidge wore the

uniforms of war correspondents and kept firearms in their room. Although the door of the room in which the interview was held was locked, Lee testified that it was locked in order to keep other correspondents out. Lee testified that appellant came to the interview of her own volition, that her husband and a friend were present, and that there was no atmosphere of tension or threat and no reason for appellant's husband to be frightened. A confession given under more terrifying circumstances than this was held valid by this court in *La Moore* v. *United States,* 180 F. 2d 49 (C.A. 9), a case in which the confessor was in leg irons and in solitary confinement.

Appellant argues that her own testimony is sufficient to invalidate exhibit 15 on the ground that it was obtained by improper inducements. The testimony upon which she relies (Br. p. 143) is that Brundidge told her at the second interview, in March 1948, that she would be doing herself a good deed by signing Lee's notes and that it would aid her in getting back to the United States. Even if appellant's statement be accepted as uncontroverted,[29] it does not follow that the failure to strike exhibit 15 was error. Clark Lee had previously testified about what the appellant had said at the original interview and had used the notes to refresh his recollection of that event. What appellant said was not a confession but only an admission, and her subsequent interview was a further admission that the notes were an accurate account of what she had originally told Lee and Brundidge. The exhibit 15 and the testimony of Hogan relative to it were, therefore, entirely corroborative of Lee's original testimony. As we pointed out above, at the time of this second interview, appellant was not under arrest or imprisonment. She appeared voluntarily, and a

[29] Appellant testified that Brundidge made the statement in the presence of Hogan (47 Tr. 5220). However, Hogan testified that Brundidge did not make such a statement in his presence, but that he did not know what Brundidge had said out of his presence or whether in fact anything was said (8 Tr. 634).

receptionist was present. No threats or coercion were used on appellant, and she was told the reason for the interview.

Even if Brundidge made the statement attributed to him by appellant, it does not constitute such an inducement as would invalidate evidence of her statements concerning the exhibit. It was not a promise of leniency or of no prosecution and held out no hope in that direction. It was not a promise that she could return to the United States if she signed the Lee notes. Moreover, Brundidge was a newspaper reporter and known to the appellant as such. He was not a Government official and could not himself either facilitate or prevent appellant's return to the United States, and appellant must have been aware of this. What he said was unsolicited advice and only that.

Since appellant had been advised by Hogan that she was being investigated for treason, a capital offense, and that it was likely she would be prosecuted, the advice of Brundidge was not such as to be probable to cause her to admit the accuracy of the Lee notes and affix her signature thereto if they did not represent her true story. Nor is it probable that she would have embarked upon such a course involuntarily. What we are concerned with is whether her second admission, the one to Hogan, was truthful, and the remark of Brundidge is not of such a character as to produce a probable incentive on the part of appellant to lie about the Lee notes. The notes contained many exculpatory statements and statements that if believed would work for appellant's benefit. When all the circumstances are considered, the probability of her telling Hogan the truth is high.

If authorities are needed there are many which hold that even in the case of true confessions much more potent considerations did not impugn the verity of the confession. Thus, a statement that in imposing sentence the courts generally take into consideration the fact that a defendant has pleaded guilty has been held not to be such an inducement as to invalidate a confession, *United States* v. *Lonardo,* 67

F. 2d 883 (C.A. 2). And a confession made after being advised that relatives and friends were about to be subjected to questioning has been held valid, *Hawkins* v. *United States*, 158 F. 2d 652 (App. D.C.), cert. denied, 331 U.S. 830; *Vogt* v. *United States*, 156 F. 2d 308 (C.A. 5); *Ruhl* v. *United States*, 148 F. 2d 173 (C.A. 10). The offer of personal influence to secure leniency when made to an attorney by a member of the board of governors of a State bar association was not sufficient inducement to invalidate an admission, *Steiner* v. *United States*, 134 F. 2d 931, 935 (C.A. 5), cert. denied, 319 U.S. 774. An admonishment to a suspect that another had given evidence against him and that it would be better for him to speak the truth was not sufficient inducement to subject the mind to "the flattery of hope or the torture of fear." In *Martin* v. *United States*, 166 F. 2d 76 (C.A. 4), and in *Young* v. *United States*, 107 F. 2d 490 (C.A. 5), it was held that the deceit practiced by disguising an officer as a fellow prisoner was not sufficient to warrant the exclusion from evidence of statements made by the prisoner to the disguised officer.

The facts here are quite different from those in *Bram* v. *United States*, 168 U. S. 532, upon which appellant relies. In that case the defendant was taken into custody, searched, examined, and stripped of his clothing. He was accused of murder, told that the police were satisfied of his guilt, confronted with an accusation of a supposed eyewitness, and exhorted not to take the blame alone but to name his accomplice. That is a far cry from the facts here developed. Here appellant was not in custody, was not searched or subjected to any indignity. She was interviewed in the presence of her husband and of other disinterested parties, and there was no atmosphere of hostility surrounding the interviews.

Exhibit 2 was not an admission but only a specimen of appellant's handwriting given to a guard as a souvenir at his request. He testified at length as to the circumstances surrounding her autographing the yen note. There was

nothing to indicate any duress or threats against the appellant.

B. The Oral Admissions

Appellant contends that her interviews with Kramer and Keeney and with Page and Fenimore were induced by "one sort of pressure or another" and that the statements made by her were inadmissible on the theory that they were not free and voluntary (Br. p. 148).

Although appellant characterizes the testimony with respect to what she said at these interviews as "Oral Confessions," her statements were not confessions. She did not admit guilt and made some exculpatory and self-serving statements.

1. THE KRAMER-KEENEY TESTIMONY

Dale Kramer and James J. Keeney were a sergeant and corporal who were correspondents for "Yank" magazine (13 Tr. 1344; 14 Tr. 1400) who talked to appellant on several occasions between September 1 and 6, 1945 (13 Tr. 1345). Kramer was first taken to see appellant by her husband (13 Tr. 1375; 14 Tr. 1404). A few days later appellant and her husband went voluntarily by street car to see Kramer at the house in which he was staying (13 Tr. 1346-1347). Kramer and Keeney told appellant that they represented Yank magazine, that they were soldiers, that Yank magazine was an Army publication for enlisted men (13 Tr. 1348; 14 Tr. 1400). She was urged to give an interview but told that it was not necessary for her to do so and that to remain silent was quite legal (13 Tr. 1375). Appellant talked freely and voluntarily (13 Tr. 1347-1349; 14 Tr. 1401), and there was no coercion, duress, or threat directed toward her (14 Tr. 1401-1402). Kramer and Keeney arranged for appellant to be interviewed by 100 war correspondents at the Grand Hotel in Yokohama (14 Tr. 1410-1411) and in so doing told her it would be better to present herself to all the correspondents and have one

interview than to remain in seclusion and be badgered by them (14 Tr. 1414).

The facts therefore are not such as to sustain appellant's argument. She was not under arrest, in custody or detention. She was not being interviewed by arresting officers or by military police. She was told the reason for the interview, and no threats or physical acts of compulsion were visited upon her. Moreover, she was attended by her husband and on at least one occasion by a Japanese friend (14 Tr. 1403). The statement about being "badgered" by correspondents was not, as appellant implies (Br. p. 150), made to induce her to talk to Kramer and Keeney but was advice given to guide her in her future relations with the press. There is no atmosphere here of a coerced or induced statement. The episode relates solely to the efforts of representatives of the press to obtain a story concerning appellant. As such, it is but the story of an everyday occurrence.

2. THE PAGE-FENIMORE TESTIMONY

Appellant argues that her interview with Page and Fenimore, who were members of the Army Counter Intelligence Corps, was involuntary because of the "pressure" previously applied by Kramer and Keeney. She makes no argument based on what transpired at her interview with Page and Fenimore. Since there was in fact no pressure or atmosphere of compulsion surrounding her interviews with the war correspondents, there was none to carry over to the Page-Fenimore interview.

C. The Testimony Which the Government Elicited From the Witnesses Moriyama, Mitsushio, Ishii, Lee, and Igarashi Was Admissible.

Appellant contends (Br. p. 224) that the court was in error in admitting certain testimony by Government witnesses elicited on direct or redirect examination by the prosecutor. This contention relates only to minor incidents in a three-month trial and is without substance.

In the course of his testimony Moriyama testified as to two statements which he heard appellant broadcast over the Zero Hour. One related to "dancing with your girl at the Cocoanut Grove" (24 Tr. 2552) and the other made reference to the heat and being at the corner drug store having an ice cream cone (24 Tr. 2553). Moriyama was able to fix the place as the broadcasting studio of Radio Tokyo, the hour as 6:15 p.m., and named other persons present (24 Tr. 2550-2553). He was unable to fix the exact date. Thus, the place of the occurrence and the time of day was fixed sufficiently to enable appellant to contradict the occurrence. Those named as being present, Oki, Reyes, and appellant, were available and in fact all appeared as witnesses in the case. The testimony was admissible. See *Graul* v. *United States,* 47 App. D. C. 543.

The prosecutor's questioning of Mitsushio concerning the date when Major Ince stopped broadcasting on the Zero Hour is perhaps repetitive but does not constitute cross-examination (13 Tr. 1325-1326). In any event the fact proved was not in dispute, since Ince appeared as a witness for the defense and testified to the same fact, giving the same date (31 Tr. 3476).

Ishii was testifying relative to news broadcasts which he made on the Zero Hour at Radio Tokyo between the spring of 1944 and November 1944. He stated that appellant was present when he made the broadcasts except on Sunday, and the time was fixed as shortly after 6 p.m. (17 Tr. 1829-1832). Ishii testified that his news broadcast dealt with war news from Japanese military sources and emphasized Allied war losses. This was a statement of fact as to what his broadcasts were about. It was not a conclusion or opinion but a statement of the contents of the broadcasts made by the person who had actually performed the work.

Appellant objects to Clark Lee's testimony that he did not hold her in detention on the ground that it "speaks for itself." No reason is assigned in the brief. Certainly

Lee could testify as to the fact of whether he was or was not holding appellant in detention.

Appellant complains (Br. p. 199) that the prosecution was allowed to lead the Government witness Igarashi and was guilty of misconduct. The witness was a Japanese national who had expressed some doubt as to his ability to testify in English because it was not his native tongue (24 Tr. 2602, 2603). This was his first experience before an American court and he stated that he was a bit confused and was suffering from stage fright (25 Tr. 2669). Contrary to appellant's contentions, the witness was not coached (24 Tr. 2641).

Under the foregoing circumstances, it would have been proper for the court to have exercised its discretion to allow the witness to be led. However, no leading questions were permitted, although the prosecutor was permitted to ask questions designed to exhaust the witness' memory of the occurrence about which he was testifying. In any event, it has been held in matters of this sort that the propriety of the questions is so largely a matter of discretion and depends so much upon the circumstances of each case, that it is unwise for an appellate tribunal to review the act of the trial court, *Wagman* v. *United States,* 269 Fed. 568 (C. A. 6), cert. denied, 255 U. S. 572; *Linn* v. *United States,* 251 Fed. 476 (C. A. 2).

None of the foregoing is error. That appellant must fasten upon such trivialities in order to attempt to bolster her case merely emphasizes the judicial ability of the trial court in its rulings upon the admissibility of the testimony of Government witnesses.

D. Exhibits 25 and 75 Were Properly Admitted.

1. EXHIBIT 25

Appellant here objects for the first time (Br. p. 226) that the trial court erred in not limiting exhibit 25 (transcript of recordings) to the actual content of the recordings (Ex. 16-21). This contention is made despite the fact that the

appellant never voiced the objection below[30] and was herself at least partly instrumental in causing the insertion of the material to which she now objects.

Exhibit 25 was a transcript of exhibits 16-21 made by an expert monitor who testified that it accurately reflected the contents of the recordings (17 Tr. 1809-1810). It was used by the jury as an aid in evaluating the contents of the recordings, and as such was admissible, *Coplin* v. *United States,* 88 F. 2d 652, 671 (C. A. 9), cert. denied, 301 U. S. 703; *Harris* v. *United States*, 48 F. 2d 771, 777 (C. A. 9). At the time exhibit 25 was originally offered, several pages now contained in the transcript[31] were not included because they dealt with a recording which Government counsel inadvertently broke in open court (17 Tr. 1814). Appellant objected on the ground, among others, that it was not full and complete (17 Tr. 1815, 1816, 1817, 1818), and the Court, upon ascertaining that the transcript was incomplete, required the prosecutor to produce the additional pages and admitted the entire transcript in evidence as exhibit 25 (17 Tr. 1819, 1820). Appellant then renewed her former objections by reference thereto and did not object to the added pages for the reason which she now advances (17 Tr. 1820; 18 Tr. 1847).

Thus, appellant did not at any time interpose an objection to the admission of the transcript on the ground that it covered recordings not in evidence, but on the contrary had previously objected to its admission on the ground that it was incomplete.

2. EXHIBIT 75

Part of appellant's defense was that the Zero Hour was an entertainment program. Appellant and two of her defense witnesses so testified (32 Tr. 3601; 34 Tr. 3875; 39

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[30] Appellant does not in her brief point out wherein she raised the objection which she now urges.

[31] From line 17, page 18, through page 23 (the page numbers are in red pencil). (See 20 Tr. 2021.)

Tr. 4403; 45 Tr. 4985, 4988) and she so argued to the jury (1 Arg. 121-125).

On rebuttal the Government offered Exhibit 75 to refute appellant's evidence on this point (52 Tr. 5859-5860). Exhibit 75 was a transcript of an interception of a Zero Hour program monitored by the Federal Communications Commission. The exhibit was made by the witness through whom it was introduced and who had monitored the program, recorded it, and typed the exhibit. She possessed an independent recollection of this particular program and was able to identify appellant's voice as the voice of one of the persons participating in the broadcast (52 Tr. 5855-5856, 5857-5858, 5861).

The exhibit contained statements made by the broadcaster which were propaganda and were vicious attacks upon the character of a high government official, now deceased. It, therefore, was admissible to disprove appellant's testimony as to the innocuous character of the Zero Hour program.

E. Identification of Appellant as "Tokyo Rose"

Appellant contends (Br. p. 180) that the prosecution considered it very important to pin the label "Tokyo Rose" on her. The record discloses, as will later be pointed out more specifically, that appellant's own acts and those of her counsel were responsible for the showing in the record that appellant was "Tokyo Rose." Exhibit 2, which was an autographed yen note with appellant's signature and the appellation "Tokyo Rose" written thereon in her own handwriting, was offered for the sole purpose of preliminarily proving appellant's signature (1 Tr. 36).

Shortly thereafter, Exhibits 4, 5, 6, and 7 (applications for passport, voter's registration affidavit, application for evacuation etc.), with appellant's signature thereon, were marked for identification and admitted in evidence. These latter exhibits pertained to appellant's citizenship and related matters. Exhibit 2 (autographed yen note) was admissible for the purpose of enabling the court and jury to

determine the genuineness of appellant's purported signature on exhibits 4, 5, 6, and 7. Title 28 U. S. C., Rev. Sec. 1731. Under the predecessor statute this court has held that it is proper, in order to prove a signature, to admit in evidence for comparison documents which witnesses testify they have seen signed by the one whose signature is questioned, *Bowers* v. *United States,* 244 Fed. 641, 648 (C. A. 9); *Fuston* v. *United States,* 22 F. 2d 66, 67 (C. A. 9); *Greenbaum* v. *United States,* 80 F. 2d 113, 124 (C. A. 9).

Appellant contends the admission of the recordings (Ex. 16-21) was error because the labels thereon bore the notation "Tokyo Rose." These were recordings of appellant's voice (9 Tr. 688-697; 48 Tr. 5382). These recordings and the labels thereon were official Government records and writings, were made in the regular course of governmental business (16 Tr. 1624, 1631, 1633, 1636, 1637, 1643, 1644, 1646, 1647, 1648, 1649), and were properly identified in accordance with the Business Records Act (Title 28 U. S. C. Rev. Sec. 1732) and the companion statute pertaining to Government books and records (Title 28 U. S. C., Rev. Sec. 1733(a)).

The Portland, Oregon, office of the Federal Communications Commission had been instructed by the Commission at Washington to monitor the Zero Hour program for a while (17 Tr. 1791, 1792; 16 Tr. 1667). The recordings and the labels thereon were also properly admitted as being of a public character and kept for public purposes. They were kept in the discharge of a public duty, *Evanston* v. *Gunn,* 99 U. S. 660, 666; *McInerney* v. *United States,* 143 Fed. 729, 736, 737 (C. A. 1); *Runkle* v. *United States,* 42 F. 2d 804, 806 (C. A. 10). The labels on the recordings can be considered as an exception to the hearsay rule. They were made under the sanction of official duty, as a record of facts to be kept in the files of the Government, *United States* v. *Cole,* 45 F. 2d 339, 341 (C. A. 6).

In any event the labels complained of on the recordings in question were not prejudicial to appellant. She testi-

fied that she had no particular antipathy toward using the name "Tokyo Rose" (48 Tr. 5352). She gave Clark Lee a souvenir of their meeting, autographed by her personally as "Tokyo Rose" (Ex. 14; 7 Tr. 481). She distributed her personal autograph as "Tokyo Rose" to thirty or forty different people (48 Tr. 5341). Early in the trial appellant's counsel brought out from Government witness Lee that appellant had stated that "she was the only Tokyo Rose" (7 Tr. 522). On cross-examination of Government witness Radio Engineer Green, appellant elicited information to the effect that "Orphan Ann" was "Tokyo Rose" (17 Tr. 1792). Her counsel also brought out testimony from Government Radio Engineer Penniwell to the effect that he had received instructions from Washington "to record the Orphan Ann portion of the Zero Hour as being Tokyo Rose" (16 Tr. 1667, 1668). Appellant herself brought out by cross-examining witness Oki that in 1944 there was some discussion about a dispatch from Stockholm which mentioned "Tokyo Rose who described herself as Orphan Ann" (9 Tr. 799, 800). The Government had not questioned Oki relative to the existence or contents of the aforesaid dispatch on direct examination. Thus, at the time the recordings were introduced, much of the testimony which tended to identify appellant as "Tokyo Rose" at the trial was already before the jury due to her own fault. Any error, if any in fact exists, was therefore harmless.

VI

Duress

A. The Law

All authorities agree that in order for a person to be relieved of the consequences of the commission of a crime on the ground of coercion the compulsion must be present, immediate, and impending and of such a nature as to induce a well founded fear of death or serious bodily injury. There must be no reasonable opportunity to escape the

compulsion without committing the crime, *R. I. Recreation Center* v. *Aetna Casualty and Surety Co.,* 177 F. 2d 603 (C. A. 1); *Shannon* v. *United States,* 76 F. 2d 490 (C. A. 10); *Gillars* v. *United States,* 182 F. 2d 962 (App. D. C.); *United States* v. *Vigol,* 2 U. S. (2 Dall.) 346; *Respublica* v. *McCarty,* 2 U. S. (2 Dall.) 86.

Force must be the basis of the fear engendered, and compulsion based upon other grounds is no defense. Thus, in *Ford* v. *United States,* 10 F. 2d 339 (C. A. 9), aff'd, 273 U. S. 593, it was held that one involved in a conspiracy to smuggle liquor could not escape criminal liability for wrongdoing because he acted under a contract obligating him to obey orders. *Guigni* v. *United States,* 127 F. 2d 786 (C. A. 1), similarly held that a captain and crew of a foreign vessel could not be given criminal immunity for the offense of sabotaging their vessel on the ground that they obeyed orders given by their government. In *State* v. *Patterson,* 117 Ore. 153, 241 Pac. 977, the defendant was not entitled to an instruction as to the defense of coercion where he showed that he committed the crime at the behest of another who threatened to expose previous criminal misconduct of the defendant unless he complied with the demand. See also the charge of Judge Washington in *United States* v. *Haskell,* 4 Wash. C. C. 402, Fed. Cas. No. 15,321.

The fear aroused must be of immediate violence; a threat of future death or bodily injury will not suffice, *People* v. *Sanders,* 82 Cal. App. 778, 256 Pac. 251; *People* v. *Martin,* 13 Cal. App. 96, 108 Pac. 1034; *R. I. Recreation Center* v. *Aetna Casualty and Surety, supra.* This principle was aptly pointed out in *United States* v. *Vigol, supra,* a case in which the defendant had been indicted for high treason, and the court charged:

> . . . the fear, which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the

> very life of the party. The apprehension of any loss of property, by waste or fire; or even of an apprehension of a slight or remote injury to the person, furnish no excuse. . . .

Thus, at the time the crime is committed, the defendant must be subjected to the danger of death or serious injury if he refuses. The necessity or compulsion must be clear and conclusive; the alternative presented must be instant and immediate, *Ross* v. *State*, 169 Ind. 388, 82 N. E. 781. Both *Fosters Crown Cases* (1776), pp. 216-217, and *East's Pleas of the Crown* (1806), pp. 70-71, upon which appellant relies (Br. p. 105), make it clear that a person who seeks to excuse treasonable conduct on the ground of compulsion must show an original and actual force upon himself.

Moreover, in the case of a continuing offense such as treason, the same authorities carefully point out that one forcibly conscripted by the enemies of the state must show that the compulsion continued during all the time he remained with the rebels or enemies and that he quitted the service as soon as he was able. In *Respublica* v. *McCarty, supra,* a case involving treason, a similar thought was expressed by the Chief Justice in his charge wherein he said:

> By the defendant's own confession, it appears, that he actually enlisted in a corps belonging to the enemy; but it also appears, that he had previously been taken prisoner by them, and confined at Wilmington. He remained, however, with the British troops for ten or eleven months, during which he might easily have accomplished his escape; and it must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with the sincere intention to make his escape,

> the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

Appellant's apparent argument that, where a person cannot obtain protection from his own government, coercion is a broader defense is not, therefore, consistent with the foregoing authorities. Such a theory, as expounded and applied by appellant in her brief, suggests a most dangerous rule of law, since all traitors under the protection of an enemy could later shield themselves from prosecution by setting up extraneous reasons for a mental fear of possible future actions on the part of the enemy. Such a defense would remove entirely the requirement that the defendant resist all advances, temptations, commands, and orders until such time as he would be faced with the harsh alternative of immediate injury or death unless he capitulated to the will of the enemy. Certainly no person should be excused for the commission of any crime, whether it be treason or some lesser offense, unless he has made every effort to escape and avoid its commission. It is only the stark neenecessity of committing the act in order to save his own life that will condone the offense. Any other less stringent rule of law would only tend to encourage the doing of an act which should not be done until all means of avoiding its commission have failed.

B. The Instructions

Tested by the foregoing legal principles, it becomes clear that the court's instruction to the jury concerning what constituted a defense of coercion was correct (54 Tr. 5977-5979). The charge here given was almost entirely identical to that approved by the Court of Appeals for the District of Columbia in *Gillars* v. *United States, supra.*[32] The fact that the court made no mention of the cumulative effect of the appellant's evidence, while pointing out that cer-

[32] See 182 F. 2d 962, n. 14, p. 976.

tain specific items thereof were not sufficient, was not error. As we have demonstrated above, a fear aroused by such events as police surveillance, the necessity of reporting to police, the belief that she would be placed in a concentration camp or deprived of a ration card will not excuse the commission of the crime. The element of immediacy is lacking, as is the element of a present and actual threat of force. Likewise, the instruction that appellant was not excused because she was ordered to do so by some superior authority, was correct, *Guigni* v. *United States, supra,* since an order unaccompanied by a threat of immediate force did not constitute the requisite compulsion.

The instructions which appellant requested (1 R. 311-315), and the omission of which she now complains, were improper for the very reason which she now assigns as the basis of her complaint (Br. p. 103). As she points out, each makes no reference to the element of immediacy. As we pointed out above, that element is necessary in a defense of this type. Without it the defense must fall.

Appellant maintains (Br. pp. 73-74) that the jury was not informed about her status in Japan although she requested instructions on that matter (1 R. 288). The court did charge the jury that she owed a local temporary qualified allegiance to Japan and that she had the duty to obey its laws (54 Tr. 5960-5961). It is difficult to perceive how the failure to state that she was an alien enemy of Japan would prejudice her in any way relative to the defense of duress. She did not contend that she was subject to any law or regulation of the Japanese Government which required her to broadcast or suffer severe bodily injury.

C. Evidentiary Rulings

Appellant does not seriously contend that she was ever at any time threatened with immediate death or serious bodily harm if she refused to work as a broadcaster at Radio Tokyo. She testified that she did not broadcast or

continue to broadcast because of any physical compulsion or force or any threats thereof (47 Tr. 5289-5290; 49 Tr. 5502, 5504).[33] Appellant admitted that no pressure was exerted upon her by the Japanese or any one else to force her to take the broadcasting position at Radio Tokyo and that she was not threatened if she did not take it (48 Tr. 5332). She was never jailed, assaulted, whipped, beaten or ill-treated by the police (47 Tr. 5291). These facts were corroborated by the Japanese witnesses who had been employed at Radio Tokyo, many of whom testified that they were unaware of any duress, coercion, or compulsion having been exercised or directed against appellant (24 Tr. 2510, 2547, 2548; 25 Tr. 2684-2685, 2752-2753).

Therefore, her own testimony concerning how she became a broadcaster contains no statement of the application of such force or threat of force as to lead her to believe that she was in immediate or imminent danger of death or serious injury. Her whole theory of duress is predicated solely upon her own testimony of her conversation with Takano, the civilian head of the Radio Tokyo business office, who told her she had to take army orders and that she knew what the consequences were (Br. pp. 76-77, 79, 119). This testimony was adduced at the very end of her case, and appellant does not point to any evidence whatsoever relating to any threat upon her in connection with her work.

Despite the utter lack of any foundation, at the time the testimony was elicited the court allowed appellant's witnesses to testify about atrocities which they had witnessed or indignities which they had suffered if the witness had told the appellant about those events at any time. Thus Cousens, Ince, and Reyes testified about many cruelties inflicted by the Japanese upon captive soldiers and civilians. These were of such a nature as to inflame the jury against the Japanese. (28 Tr. 3116-3121, 3146; 31 Tr.

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[33] See Appellant's Brief, p. 79.

3567-3571; 32 Tr. 3665-3666, 3667, 3668, 3669-3670, 3671, 3672-3674, 3675.)

Appellant has pointed to many instances of such testimony in her brief, pages 79-81, and also has directed attention to the fact that she was permitted to cross-examine Government witnesses about how they had been treated by the Japanese, although they had not apprised appellant of these facts (Br. p. 82).

Appellant argues that the court was in error in refusing to admit (a) evidence of duress on others not communicated to her, (b) evidence that the entire broadcasting staff of Radio Tokyo was in a state of fear, (c) certain evidence of duress on others and communicated to apellant, and (d) evidence that appellant's neighbors made demonstrations against her. She seeks to justify the admissibility of this evidence on the theory that it tends to prove what she thought would be the consequences of a refusal to broadcast and that any fear which she might have had was "well grounded." If appellant had produced competent evidence that she had been threatened with some immediate and drastic action on the part of the Japanese military authorities in the event of a refusal to broadcast, her position might be better taken; but such is not the case. She admits there were no such threats. She is, in effect, trying to avoid the necessity of such a threat or of a positive action by any Japanese in authority by showing that she was afraid, because of other circumstances, to refuse. It is at exactly this point that her whole defense breaks down. She cannot excuse herself on the ground of what she thought might happen to her. She was never at the last ditch, but capitulated much too readily to avail herself of the legal defense.

The law is clear and the reason convincing. There must be actual imminent danger, not a danger conjured up in the mind as to what might happen. She is required to be steadfast in her determination to resist the commission of

a wrong until such time as she can no longer refuse without immediate reprisal.

What we are concerned with is whether appellant was threatened with an actual danger to her life or person at the time she agreed to broadcast and did broadcast. In *Gillars* v. *United States,* 182 F. 2d 962, 974-976 (App. D. C.) it was held that threats to others who were also employed on the German radio were properly excluded. Such evidence was closer to the mark than any offered here.

There are also other reasons of a more technical nature why it was not error to exclude much of the testimony about which appellant complains. Appellant bases her argument on her own testimony of her conversation with Takano, which was adduced at the end of her case.[34] She does not point to any other evidence relating to any threat against her in order to induce her to broadcast. Therefore, the trial court was acting within its discretion in excluding evidence of an inflammatory nature as to acts of which the appellant had no knowledge. The order of proof is largely a matter over which the court may exercise discretion, *United States* v. *Montgomery,* 126 F. 2d 151 (C. A. 3), cert. denied, 316 U. S. 681; *Thiede* v. *Utah,* 159 U. S. 510, 519.

Moreover, much of the evidence which she offered did not tend to show the likelihood that she would have been promptly mistreated or killed if she had refused to broadcast. The anger of her neighbors was not directed to her radio activities but toward her Christmas spirit (Br. p. 91). The evidence of conditions of the prisoners of war at Camp Bunka, established after appellant had been broadcasting several months, and about which she had no knowledge, related to the treatment by the Japanese of persons in a category different from that of appellant and dealt with a collateral matter. They were prisoners; she was a civilian employee of the radio station. Moreover, the former pris-

[34] Appellant was almost the last witness for the defense. She was followed by attorney John Hogan, who was making his third appearance on the stand, and her attorney, Theodore Tamba (50 Tr.).

oners of war Henshaw, Cox, and Kalbfleish did not know the appellant (37 Tr. 4163-4164, 4185, 4186, 4261, 4277-4278). Parkyns saw her only three times at Radio Tokyo and did not testify as to any conversations with her (37 Tr. 4206). The Dutch prisoner Schenk had seen appellant only a "couple of times" at Radio Tokyo and could not testify as to any conversations with her (2 R. 521-522). Nevertheless out of an abundance of caution, the court permitted these witnesses to relate instances of mistreatment by the Japanese and that they were forced to work at Radio Tokyo (37 Tr. 4157-4158, 4165-4166, 4199, 4252, 4278-4279).

Appellant's complaint that the witness Couzens was not permitted to relate certain conversations with her pertaining to the treatment of prisoners of war at Camp Bunka (Br. p. 89) is invalid. The quotation in her brief at page 89 is that of an argument which her attorney made to the court and not of a question which he addressed to the witness (29 Tr. 3254-3255). The question to which objection was sustained at 29 Tr. 3287 was clearly leading and objected to as such. Moreover, the question was asked in another form immediately thereafter and the witness permitted to answer (29 Tr. 3287).

The limitation of the cross-examination of the Government witnesses Tsunishi and Oki of which appellant complains at pages 92-93 of her brief was proper. Appellant's cross-examination of these witnesses went far beyond the scope of the direct examination and amounted to putting in an affirmative defense during the presentation of the Government's case. This was patently improper and it was within the court's discretion to exclude the evidence which appellant sought to bring out at that time, *Putnam* v. *United States*, 162 U. S. 687, 707; *The Philadelphia and Trenton Railroad Co.* v. *Stimpson*, 39 U. S. (14 Pet.) 448, 461; *United States* v. *Minuse*, 142 F. 2d 388 (C. A. 2), cert. denied, 323 U. S. 716; *McBride* v. *United States*, 101 Fed. 821, 824 (C. A. 8); *Chevillard* v. *United States*, 155 F. 2d 929, 934 (C. A. 9).

On the whole the appellant was afforded a much wider latitude in her proof of conditions in Japan and the treatment of prisoners of war and civilians than is strictly permissible under the issue of duress. Certainly enough evidence was before the jury to afford them an insight into the appellant's situation in Japan at the time she worked at Radio Tokyo and to enable them to evaluate her actions in the light of those conditions.

D. The Geneva Convention

In this case the offense of treason consists of adhering to the enemies of the United States, giving them aid and comfort, plus the commission of an overt act. Thus, it is an offense primarily of the mind, heart, and spirit, coupled with the doing of an act which will assist the enemy.

The Geneva Convention is primarily a contract between nations relating to the manner in which they will conduct themselves in relation to each other. It in no way modifies or supersedes the criminal laws of this country. Even if it be construed as permitting the enemy to use prisoners of war for work indirectly connected with their war effort, it does not follow that Congress ever intended to permit United States citizens, whether prisoners of war or uninterned civilians in enemy hands, to escape liability for treason because the overt act might be considered an indirect aid to the enemy. If the adherence to the enemy, the treasonable intent, is present no citizen is excused. The treaty in no way condones an adherence, and it does not alter or modify the existing law. Without adherence, without treasonable intent, appellant could perform acts conceivably more helpful to the enemy than those she committed here. See *Cramer* v. *United States,* 325 U. S. 1, 29; *Haupt* v. *United States,* 330 U. S. 631, 634-635. It was not the direct or indirect character of her act which constituted the offense. It was the commission of the act with treasonable intent.

Therefore, regardless of whether appellant was a prisoner of war within the meaning and intent of the treaty—and the Government does not admit she was—the instructions which she requested (1 R. 298-308) were properly refused, since they would have created a false issue and confused the jury as to the true issue involved, namely, whether appellant adhered to the enemy and committed any of the overt acts charged with treasonable intent.

VII

Cross-Examination of Defense Witnesses

A. Cross-Examination of Appellant

Appellant contends that it was improper for the court to permit the prosecutor to cross-examine her with respect to the variance between certain portions of her testimony and the testimony of previous Government witnesses (Br. pp. 153-163); that on several occasions the prosecutor misstated the testimony of other witnesses in examining her (Br. pp. 176-179); that it was error to permit her to be cross-examined concerning overt act 8 (Br. pp. 164-168); and that there were numerous other erroneous rulings relating to her cross-examination (Br. pp. 168-175).

Appellant was present throughout the entire trial and her direct testimony, which came at almost the very end of her defense, consumed the better part of four days (44 Tr.; 47 Tr.). The direct testimony covered the period of her entire life ranging from her birth in 1916 down until her arraignment before the United States Commissioner in the fall of 1948 for the offense for which she was on trial. She gave a detailed account of her activities in Japan, particularly as they related to her employment at Radio Tokyo. During the course of her direct testimony, she stated that between November 1943 and August 1945 she had never adhered to the Japanese Government or the Broadcasting Corporation of Japan and had never given aid and comfort to the enemy of the United States or intended so to do.

She testified that during the same period of time she never did anything with intent to lower or undermine American military morale, or with intent to create nostalgia or war weariness among the American troops. Appellant also testified that during the above period she never did anything with intent to discourage the American armed forces, and that she did nothing with intent to impair the capacity of the United States to wage war (47 Tr. 5233-5235). On cross-examination her testimony can only be characterized as evasive (48 Tr. 5378-5382; 49 Tr. 5390-5393, 5443-5446).

Appellant, by the very scope of her direct examination, subjected herself to a full and searching cross-examination on behalf of the United States, *Powers* v. *United States,* 223 U. S. 303, 315; *Shipley* v. *United States,* 281 Fed. 134 (C. A. 5), cert. denied, 260 U. S. 726. The latitude to be allowed the Government in its cross-examination of the appellant is a matter within the sound discretion of the trial court, whose rulings in that regard will be reviewed only in the event of an abuse of discretion, *Austin* v. *United States,* 4 F. 2d 774, 775 (C. A. 9); *Land* v. *United States,* 177 F. 2d 346, 350 (C. A. 4).

When appellant came to the witness stand she was clothed with the legal presumption of credibility, a presumption which was, however, rebuttable, and it was quite appropriate for the Government to cross-examine her in such a manner as to test her credibility, *United States* v. *Waldon,* 114 F. 2d 982, 984 (C. A. 7), cert. denied, 312 U. S. 681. In questioning appellant her predilection for half-truths, her evasiveness, and her direct contradiction of some of her own witnesses, as well as those of the Government, created a situation in which it was appropriate to test her memory and her credibility by reference to the testimony of other witnesses. Such an examination afforded an opportunity for the jury to determine whether the appellant was steadfast in her conviction that her memory with respect to events was accurate and correct. The means and the readiness with which she accepted this challenge af-

forded a sure test of her reliability. If she was positive of her position and certain with respect to the veracity of her answers, this line of questioning provided a challenge which, if she had but accepted it squarely, conceivably could have produced an acquittal. On cross-examination, appellant was first asked whether she had listened to a Government witness testify on a certain point (49 Tr. 5460-5468). In many instances she testified that she was unable to recall the testimony of the Government witness on the particular point which was the subject matter of the interrogation, and the examination was ended there (49 Tr. 5397, 5466-5467). In only a few instances was she pressed to answer as to the verity of the previous testimony, and on several occasions she was able to explain the difference between the testimony (49 Tr. 5455-5456, 5474). The cross-examination was properly allowable as a means of attacking appellant's credibility, *Reagan* v. *United States*, 157 U. S. 301, 305.

Similar cross-examination, obviously more prejudicial than that here involved, arose in *United States* v. *Buckner*, 108 F. 2d 921, 929 (C. A. 2), cert. denied, 309 U. S. 669, in which the court of appeals held that Government examination inquiring how far the defendant would persist in his statements, in the light of other expected testimony, did not require a mistrial on the ground that it constituted an attempt by the prosecution to inject into the questions propounded evidence not otherwise admitted. In that case the court of appeals states:

> The line between proper cross-examination, inquiring of a witness how far he will persist in his statements in the light of other expected testimony, and questions which seem to set forth such testimony as facts, becomes narrow and a considerable discretion in determining it should be left to the trial judge.

Appellant's complaint that on cross-examination she was confronted with questions containing misstatements of the

facts by the prosecutor is utterly unfounded (Br. pp. 176-179). On cross-examination, she was asked whether or not she had told a friend (Chiyeko Ito) that Kuroishi had told appellant to apply for a position at the Radio, and that several other girls had applied for the same position. Miss Ito, the appellant's friend, had testified on her behalf and on cross-examination had stated that appellant told her that Kuroishi had told the appellant to apply for the job at Radio Tokyo (40 Tr. 4533). She had given a signed statement to special agents of the Federal Bureau of Investigation which contained the same statement (Ex. 68). On cross-examination, Miss Ito testified that the signed statement was substantially true (40 Tr. 4537-4538). Thus, appellant's contention that the testimony about her job application was misquoted to her by the prosecutor is totally without any foundation in the record.

Appellant also complains that the prosecutor asked her whether she had heard the witness Cousens say that he was against the Allied policy of unconditional surrender (49 Tr. 5458). This question was not answered and therefore did not inure to appellant's detriment. Furthermore, the question contained no erroneous assumption, since Cousens admitted on cross-examination that he was against the Allied demand for an unconditional surrender by the Japanese (30 Tr. 3432-3433). Cousens also admitted being the author of exhibit 48, a radio script which characterizes the Allied demand for unconditional surrender as, "Some people in America still talk this madness of unconditional surrender." And so, again, we find appellant's claim that the Government misquoted testimony in its cross-examination of her to be completely unfounded.

Appellant maintains (Br. p. 178) that the prosecution "browbeat her for six pages" trying to make her say that she never applied for reestablishment of her citizenship. This is a violent statement, to say the least, and exceeds the propriety of the situation under consideration. Appellant was most evasive in her testimony on this point (50

Tr. 5540-5545). She never did file an application for re-establishment of American citizenship, and the record so discloses. The only application which appellant filed with the Department of State was an application for a passport with supporting documents (50 Tr. 5543-5545).

Appellant's claim that her cross-examination as to overt act 8 set forth in the indictment was beyond the scope of her direct examination is predicated upon a narrow conception of the allowable scope of the cross-examination of a defendant (Br. pp. 164-168). Even a cursory examination of the record discloses beyond peradventure of a doubt that the cross-examination with respect to overt act 8 not only was proper but was well within the limits of her direct examination.

Appellant's alleged criminal intent during the entire period of her employment at Radio Tokyo was a crucial issue. As she pointed out, she had specifically denied any treasonable intent. However, what is designed in the minds of an accused is never susceptible of proof by direct testimony. This is particularly true in a treason prosecution, *Cramer* v. *United States*, 325 U. S. 1, 31. On the issue of intent, the prosecution was entitled to have the jury consider all the evidence related to appellant's treasonable broadcasting activities at Radio Tokyo for the purpose of enabling them to determine whether she harbored the requisite criminal intent, *Chandler* v. *United States,* 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918. This includes what she did and also what she said, *Haupt* v. *United States,* 330 U. S. 631, 642.

The indictment charged that overt act 8 was committed between May 1, 1945, and July 31, 1945 (1 R. 6). On direct examination, appellant spoke of her work at Radio Tokyo in May 1945 (45 Tr. 5070-5071) and of her absence therefrom during the same period of time. She also testified as to what personnel acted as announcers during that period of time (45 Tr. 5074). She related in detail her knowledge of the operations at Radio Tokyo and her famili-

arity with the Zero Hour program (46 Tr. 5137, 5138). When the appellant took the stand and testified about criminal intent, about her activities at Radio Tokyo, and about all the details concerning her life in Japan, she opened wide the door for cross-examination with respect to overt act 8, since all her activities at the Radio had a bearing on the question of her alleged traitorous intent.

In a similar instance, this court stated in *Austin* v. *United States,* 4 F. 2d 774 (C. A. 9) (p. 775):

> The testimony of the plaintiff in error, while brief, was to the effect that he was a mere agent or solicitor, and not the principal, in the transaction complained of; but this testimony, brief as it was, opened up the entire case, because his activities had a material bearing on the issue.

Cross-examination, which is in effect further examination by the opponent, has for its utility the extraction of all the circumstances known to the witness but previously undisclosed by him in his direct testimony, *Branch* v. *United States,* 171 F. 2d 337, 338 (App. D. C.). Thus, an accused who testifies in his own behalf in a criminal case can be compelled to supply the full details of matters within the scope of the direct examination but about which he has testified only in part. This principle was carefully elucidated by this court in *Diggs* v. *United States,* 220 Fed. 545, 563 (C. A. 9), aff'd, sub nom. *Caminetti* v. *United States,* 242 U. S. 470. At page 563 this court said:

> I am firmly persuaded that the defendant having taken the stand and offered his testimony upon the merits of his case, and having entered into it in part, rendered himself amenable to cross-examination as to the whole, and further when he sought to show that the girls went upon the journey of their own free will and accord, without persuasion and inducement upon his part, then that his acts and demeanor at the time of

> leaving, including the purchase of tickets, and while upon the trip and at Reno, became subjects of perfectly legitimate inquiry, to test the accuracy of his own rendition of how they all came to go upon the same journey. A defendant cannot tell a half story touching his defense, which is a half story from his standpoint of the merits of the case, then abruptly stop in his course and decline to answer further, and expect to reap the benefit for himself to be derived therefrom, without incurring the discredit that is, by the rules of evidence and legal inference, visited upon the ordinary witness pursuing a like course.

This principle has been adopted by the Fourth Circuit in *Bowling* v. *United States,* 18 F. 2d 863 (C. A. 4), wherein the court stated that in its opinion the weight of authority holds that an accused who voluntarily takes the stand as a witness for his own purpose can be properly cross-examined on all material matters connected with the particular case, and that his offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between them.

The suggestion that the Government's cross-examination forced appellant to incriminate herself is utterly devoid of merit. When she took the witness stand in her own behalf she waived her constitutional privilege of silence, and the Government had the right to cross-examine her upon the evidence in chief with at least the same latitude as would be exercised in the case of an ordinary witness, *Sawyer* v. *United States,* 202 U. S. 150; *Rea* v. *Missouri ex rel Hayes,* 84 U. S. 532; *Fitzpatrick* v. *United States,* 178 U. S. 304, 315.

Appellant's remaining contentions are equally unmeritorious. She contends that she was asked repetitive and argumentative questions, and questions calling for conclusions, when she was cross-examined. These contentions are without merit and appear almost too trivial to merit a

reply. It is sufficient to say that the extent to which the Government may go in a criminal case in the cross-examination of a defendant for purposes of impeachment is largely a matter of discretion with the trial judge, *Silverman* v. *United States,* 59 F. 2d 636, 639 (C. A. 1), cert. denied, 287 U. S. 640; *Gowling* v. *United States,* 64 F. 2d 796, 798 (C. A. 6). For example, appellant claims it was improper for the prosecution to ask her if she had ever regained Japanese nationality. This was a proper line of questioning to pursue inasmuch as her allegiance to the United States was in issue. Furthermore, in exhibit 5 in a sworn statement, appellant stated that her name was entered in her father's family register on September 13, 1916, but her father in 1932 took steps to have her renounce her Japanese nationality, and her name was crossed out of his register on January 13, 1932. She stated further in exhibit 5 that she never regained Japanese nationality since January 13, 1932.

Likewise, appellant complains because the prosecution asked her on cross-examination if she were an American citizen (Br. p. 173). The indictment alleges she was a citizen of the United States, and one who owed allegiance to the United States at the time of the commission of the acts pleaded in the indictment (1 R. 2). Her citizenship and allegiance were issues below, and the trial court so instructed the jury (54 Tr. 5956). She had made contradictory statements under oath as to her citizenship. In exhibit 5, sworn to in 1947, she stated she was an American citizen, but in 1949 she swore in an affidavit in support of a special plea herein, that she was a citizen and national of Portugal (Ex. 72).

Appellant contends that it was prejudicial error to allow the prosecution to cross-examine her as to her knowledge of the purpose of the Japanese radio programs. She testified on direct examination that she had been told that the Zero Hour program was an entertainment program only (45 Tr. 4999). Her knowledge as to the propagan-

distic purposes and use of the Zero Hour program was one of the issues in the case. Also the cross-questioning complained of was proper as going to appellant's intent and to her knowledge of the propagandistic purpose of the Zero Hour program on which she was employed as an announcer and broadcaster, *Cramer* v. *United States,* 325 U. S. 1, 31. On the issue of intent the prosecution was entitled to have the jury consider all evidence having a rational bearing on what was in appellant's mind—which necessarily is a matter of inference, *Chandler* v. *United States,* 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918. In *Best* v. *United States,* 184 F. 2d 131, 137 (C. A. 1), the Court of Appeals for the First Circuit made the following statement which is pertinent to the point under discussion:

> Best certainly knew he was dealing with enemy agents. He knew the hostile mission of the German short wave station, which was to facilitate a German military triumph by disintegrating the fighting morale of the American armed forces and the civilian population.

Appellant contends that she was questioned on cross-examination as to a confidential and privileged communication passing between herself and her husband. The question complained of inquired if appellant had told her husband that she was a Portuguese national (48 Tr. 5321). Appellant was unable to recall any such conversation, so that the cross-questioning complained of was not in any event prejudicial to her (48 Tr. 5321). But the privilege that existed concerning conversations between appellant and her husband was waived when she put her husband on the witness stand as her witness and interrogated him as to conversations with appellant regarding her nationality. Appellant's husband testified on direct examination that appellant had told him on many occasions that she was an American citizen and that she had been reared and educated in America (43 Tr. 4785). Appellant's husband testified without objection on cross-examination that appellant had

told him she was a Portuguese national (44 Tr. 4879). Under this state of the record, appellant waived any privilege that obtained, by herself revealing the conversation and its contents in open court. This court has had occasion to rule on a similar situation. In *Wolfle* v. *United States,* 64 F. 2d 566 (C. A. 9), this court held that a letter from a man to his wife was not privileged where the contents of the letter were revealed to the stenographer to whom the letter was dictated. The Supreme Court affirmed in *Wolfle* v. *United States,* 291 U. S. 7.

Appellant's contention that the prosecution's conduct in cross-examining her was so grossly improper and unfair as to fall within the disapproval expressed in *Berger* v. *United States,* 295 U. S. 78, 84, is without merit. In that case the Court said of the Assistant United States Attorney (p. 84):

> He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they have not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending that a witness had said something which he had not said and persistently cross-examining the witness on that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general of conducting himself in a thoroughly indecorous and improper manner.

Appellant here makes out no such case. There was no persistent continued course of misconduct such as would constitute a general conducting of the prosecution in a thoroughly indecorous or improper manner, no bullying and arguing with witnesses, no pretense that a witness said something that he had not said, no suggestion that statements had been made to him personally out of court, as to which no evidence was offered, no assumption of facts not

in evidence, and no putting of words in the mouth of the witness under examination.

The record shows that while cross-examination of appellant was firm, as it must be, there was no bullying, but merely an effort made to elicit responsive answers to the questions propounded. Firmness and persistence on the part of the prosecutor were required in order to cope with the evasive and elusive answers of the appellant. There is no pronounced and persistent misconduct with a probable cumulative effect such as was found to exist in the *Berger* case. Moreover, this was not a weak case but a strong one. Had the *Berger* case been as strong as this one, it is doubtful whether even there the Supreme Court would have reversed on the ground of misconduct. (See *Berger* v. *United States*, 295 U. S. 78, 89.) Abstract inerrancy is hardly possible in the trial of a case in a Federal court; it is never an essential to a valid trial there, *Maryland Casualty Co.* v. *Reid*, 76 F. 2d 30, 33 (C. A. 5); *Langford* v. *United States*, 178 F. 2d 48, 55 (C. A. 9), cert. denied, 339 U. S. 951. Appellant's guilt having been abundantly proved, her attempt to turn the case into a trial of Government counsel, though a not infrequent expedient of defendants who have no other recourse, ought not to succeed, *United States* v. *Dubrin*, 93 F. 2d 499, 506 (C. A. 2), cert. denied, 303 U. S. 646.

B. Cross-Examination of Other Defense Witnesses

1. CHIYEKO ITO

Appellant contends that the Government was permitted to cross-examine her witness Chiyeko Ito about conversations with appellant, the subject matter of which had not been touched upon during the direct examination, and that the prosecutor had, in the course of such examination, misstated the record (Br. pp. 199-200, 235-237).

Chiyeko Ito had testified on direct examination about many conversations which she had with appellant during the period from February 1942 through August 1945 (40

Tr. 4506-4507, 4510, 4512, 4514-4515, 4516, 4517, 4518). The testimony related to those parts of appellant's conversations with the witness which were concerned with appellant's attitude toward the Japanese, the retention of her American citizenship, a belief that America would win the war, and a desire to return to the United States (40 Tr. 4508-4510, 4511, 4512, 4514, 4515). The cross-examination was directed at these very conversations in an effort to ascertain what else the appellant had said (40 Tr. 4525). This examination brought out the fact that appellant had talked about her work at Radio Tokyo (40 Tr. 4525-4526, 4527), and the Government then questioned the witness about the conversations with appellant relative to appellant's work at Radio Tokyo (40 Tr. 4529), her attitude toward such work, and her desire to return to the United States (40 Tr. 4531-4532).

Since the direct testimony was obviously directed to the issue of appellant's intent, it was appropriate for the prosecution to bring out everything which appellant had said in the conversations which might bear upon the issue of intent. Therefore, the cross-examination was a continuation and exploration of the conversations about which the witness had testified on direct and was material on the question of appellant's criminal intent, *Chandler* v. *United States,* 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918.

Not only was the cross-examination proper as related to the question of appellant's intent, and thus qualifying and modifying the effect of the direct testimony as to that issue, but it was also permissible under the rule which permits an adverse party to bring out the details of conversations to which the witness has testified on direct examination, *Gerard* v. *United States,* 61 F. 2d 872, 875 (C. A. 7). This is particularly appropriate where, as here, counsel for the defense had brought out only such parts of the conversation as were favorable to the accused, *Banning* v. *United States,* 130 F. 2d 330, 338 (C. A. 6), cert. denied, 317 U. S. 695.

Although the prosecutor inadvertently stated that "She answered on direct examination from 1942 to 1945 she talked about her announcing" (40 Tr. 4529), there was no deliberate misconduct on his part. The prosecutor was not questioning the witness but was responding to an objection. He had previously agreed with the court that "there was no testimony developed concerning any conversations in relation to her work at the radio station" (40 Tr. 4528). The statement, therefore, could not have misled the court, and as it was not addressed to the witness no harm ensued to appellant.

2. REYES

Appellant asserts that the prosecutor, *once* in cross-examining her and *once* in the cross-examination of the defense witness Reyes, called for a "yes" or "no" answer and then refused to afford the witness an opportunity to explain the answer given (Br. p. 200). Appellant, when asked if she had ever been naturalized as a Portuguese (47 Tr. 5285), gave evasive answers to the question propounded (47 Tr. 5286, 5287, 5288), and *was* allowed *to* explain her answer (47 Tr. 5288).

Appellant's witness Reyes repeatedly testified falsely under oath (33 Tr. 3752, 3753, 3754, 3757, 3788). The court gave him an opportunity not only to explain his answer to the question complained of, but also to explain why he had given false testimony (33 Tr. 3788; 35 Tr. 3969). On redirect, Reyes was again given ample opportunity to explain the falsity of his testimony (34 Tr. 3886-3898). The cross-examination of Reyes was performed in such a manner as to clarify his testimony and bring out the truth concerning essential facts. Appellant's rights were not prejudiced by the Government's cross-examination of this witness, or by the court's rulings on her objections to that cross-examination, *Todorow* v. *United States,* 173 F. 2d 439 (C. A. 9), cert. denied, 337 U. S. 925.

Appellant objects (Br. p. 232) because, in cross-examining Reyes, the prosecution asked him whether Ince had

married a Filipino woman (32 Tr. 3706). On direct examination Reyes had testified at length about his personal and working relations with Ince, and also concerning Ince's activities at Radio Tokyo (32 Tr. 3588, 3589, 3590, 3598, 3599, 3600). The purpose of the question was to test the credibility of the witness. Reyes answered that he did not know whom Ince had married (32 Tr. 3706, 3707). The Government had used witnesses of various races and nationalities, one of whom, Villarin, was a Filipino. Reyes was himself of Philippine extraction and had married a girl of Japanese extraction (32 Tr. 3703-3704). The question and answer, therefore, caused appellant no harm, *Ross* v. *United States,* 93 F. 2d 950 (C. A. 7). The trial court's ruling on the objection was one that was well within its sound discretion.

Appellant lists many instances in which she asserts that error was committed in the cross-examination of her witness Reyes (Br. pp. 237-241). Many of these allegations require little answer and scant attention. Reyes was a Philippine national who collaborated with the Japanese at Radio Tokyo (Ex. 52, 54) and who admitted having given false testimony (33 Tr. 3752, 3753, 3754). At the time of the trial he was 27 years of age and had had three years of university training (33 Tr. 3702).

Appellant contends (Br. p. 237) that after the Government elicited testimony from Reyes that his statements in exhibit 52 were not true (33 Tr. 3748), it was improper to ask him if he had not testified previously that the statements in exhibit 52 were true (33 Tr. 3749). Appellant asserts that such a question was putting words into the mouth of the witness because the witness had not previously testified that the contents of exhibit 52 were true. The record discloses the contrary. Reyes not only testified that everything he told the agents of the Federal Bureau of Investigation was true (32 Tr. 3688; 33 Tr. 3739), but that the statement he gave to the special agents was true (33 Tr. 3746).

Appellant urges (Br. p. 240) that the cross-questioning of Reyes found at 33 Tr. 3747-3748 was argumentative. Here the Government was seeking merely to determine the verity of the contents of a signed statement given by Reyes to special agents of the Federal Bureau of Investigation (Ex. 52), which signed statement contradicted and was inconsistent with the testimony of the witness on direct.

Appellant maintains that Reyes should not have been cross-questioned as to the truth of the statements in exhibit 54 (another statement he had given to agents of the Federal Bureau of Investigation) without the document being exhibited to him in open court (33 Tr. 3769-3770). The Government did show the exhibit in question to the witness (33 Tr. 3821, 3823), and on redirect he was given full opportunity to explain the facts and circumstances surrounding its execution (34 Tr. 3915-3936). Appellant makes a like complaint (Br. p. 240) concerning the script (Ex. 53) of one of Reyes' broadcasts, but the record shows that this script was shown to the witness (33 Tr. 3777) and that he was afforded an opportunity to read it before it was admitted in evidence (33 Tr. 3778).

Appellant argues that it was error for the Government to ask Reyes on cross-examination if certain exhibits marked for identification (Ex. 55, 62, 63) were, purported to be, or appeared to be scripts of the Zero Hour program (34 Tr. 3839, 3840, 3868, 3869, 3870). Reyes had been one of the participants in the Zero Hour program (32 Tr. 3596, 3601), and it was perfectly proper for the Government at this juncture to endeavor properly to identify the scripts through him. In any event no prejudice ensued to appellant, because Reyes did not sufficiently identify the exhibits to warrant their introduction in evidence. Of said three scripts, only one (Ex. 63) went into evidence, and that on rebuttal through Government witness Roth (52 Tr. 5851).

Despite Reyes' testimony on direct that he had read all of defendant's scripts (32 Tr. 3620, 3621) and that he was also present every time she broadcast (32 Tr. 3621), appel-

lant contends (Br. p. 241) that it was improper to permit the Government to cross-question him as to what he said over the microphone on the Zero Hour program. Reyes was not asked at this point about the identification of radio scripts, but as to what he himself had said over the microphone (34 Tr. 3837, 3838, 3843, 3844, 3845). The cross-examination was proper and appropriate as going to the interest and credibility of the witness, *Chandler* v. *United States,* 171 F. 2d 921, 944 (C. A. 1), cert. denied, 336 U. S. 918; *Alberty* v. *United States,* 91 F. 2d 461, 464 (C. A. 9). It was also proper cross-examination for the purpose of negating the direct testimony of the witness that the Zero Hour program was only an entertainment program (32 Tr. 3601). Indeed, the entire cross-examination of Reyes, and the scope thereof which was allowed the Government, was a matter which rested in the sound discretion of the trial court, and the record does not disclose any abuse of discretion in that regard, *Madden* v. *United States,* 20 F. 2d 289, 292 (C. A. 9), cert. denied, sub nom. *Parente* v. *United States,* 275 U. S. 554; *Brady* v. *United States,* 20 F. 2d 400, 403 (C. A. 9), cert. denied, 278 U. S. 621. In view of the fact that Reyes repeatedly confessed having given false testimony it was not an abuse of discretion for the court to permit the Government some leeway in its endeavor to bring out as much of the truth as was possible under the circumstances.

3. WALLACE INCE

Appellant asserts (Br. pp. 231-232) that the Government indulged in race prejudice because in cross-examining her witness Ince, the prosecutor referred to her as a "Japanese" (31 Tr. 4543). Shortly before the question objected to was propounded, the witness had referred to appellant as a Japanese (31 Tr. 3533). The Government's reference to appellant as being Japanese was for the obvious purpose of distinguishing between the Japanese employees at Radio Tokyo and employees of other nationality.

No prejudice could possibly have resulted from this reference to appellant, since her racial origin was quite apparent. On direct examination the appellant herself readily testified to facts showing that she was of Japanese ancestry (44 Tr. 4909, 4911, 4914, 4915, 4916, 4917, 4918).

VIII

The Trial Court Did Not Improperly Exclude Material and Relevant Evidence Offered by Appellant

A. Evidence Directly Offered

1. CITIZENSHIP

Appellant sought to prove that while at Sugamo Prison from December 1945 until October 1946, she was "classified" as a Japanese national insofar as the mail privileges were concerned and that she received the mail privileges usually accorded to a Japanese or Portuguese national (43 Tr. 4707, 4708, 4719). She also offered to prove that after she was released from Sugamo the Japanese officials issued her the ration card of a Portuguese and not that of an American citizen (44 Tr. 4849). A similar offer of proof was made by her counsel while appellant was testifying on her behalf (47 Tr. 5225, 5226). She argues that such evidence indicates that the Government doubted her status as an American citizen and that it was imporperly excluded (Br. p. 215-216).

Objections to these offers were properly sustained, since they called for conclusions, were not the best evidence, were hearsay, and were otherwise incompetent. The action of Japanese officials obviously was not evidence of the views of this Government or its officials. Nor do the mail privileges accorded her while in Sugamo indicate that this Government had made any official decision as to her status. At best, they were only evidence of conclusions arrived at by some person unknown. Furthermore, her offer related to events occurring long after the period of time set forth

in the indictment and thus had no bearing on her status at the time of the commission of the offense.

In view of her counsel's statement at the trial that: "She never had Japanese nationality. It is an absolute impossibility as a matter of law" (47 Tr. 5242), and her own testimony that she never thought she had Japanese nationality (47 Tr. 5243) and that while working at Radio Tokyo she represented herself as an American citizen (47 Tr. 5248), it is apparent that appellant was not defending on the ground of Japanese citizenship. Her marriage on April 19, 1945 (43 Tr. 4759), which constituted her only possible claim to derivative Portuguese nationality,[35] took place six months after the commission of the overt act which the jury found proved. Therefore, the exclusion of the evidence in question could not have had any possible prejudice to her, since she could not possibly have acquired Portuguese citizenship at the time she committed overt act 6, and she never claimed Japanese nationality but consistently and repeatedly denied having acquired it.

2. EVIDENCE THAT APPELLANT'S BROADCASTS WERE HARMLESS AND POSSIBLY BENEFICIAL TO UNITED STATES MORALE

Appellant offered certain evidence to the effect that her broadcasts were either beneficial to the morale of American military men or were harmless. The evidence so offered was excluded upon the Government's objection thereto and she now argues that it was admissible to prove that her broadcasts were calculated to aid the United States and injure Japan (Br. pp. 200-205). However, at the trial appellant did not advance that reason as justifying the admission of the evidence offered (40 Tr. 4560-4561; 39 Tr. 4348; 40 Tr. 4455-4456; 50 Tr. 5596-5599).

Regardless of how appellant twists the reason for offering this type of evidence, it was incompetent and immaterial. The success or failure of the treasonable plan is immaterial. She cannot prove her intent by what some listen-

[35] Title 8 U. S. C. §§ 801, 808.

ers thought about her broadcasts. Whether it was considered as poisonous propaganda or uplifting entertainment by the American armed forces, proves nothing as far as her intent was concerned.

It is well settled that the traitorous plan does not have to be successful in order to warrant a conviction, *Chandler* v. *United States,* 171 F. 2d 921, 941 (C.A. 1), cert. denied, 336 U.S. 918; cf. *Gillars* v. *United States,* 182 F. 2d 962, 977 (App. D.C.). In *Haupt* v. *United States,* 330 U.S. 631, 644, the Supreme Court stated:

> His acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed.

From the earliest days of our Republic down to the latest treason trial, it has been held by the various courts that the act of treason need not have been successful in order to subject the defendant to conviction for commission of that act. The earlier Federal cases concerning this subject are: *United States* v. *Greathouse,* 4 Sawy. 457, Fed. Cas. No. 15254 (C.C., D. Cal.); *United States* v. *Pryor,* 3 Wash. C.C. 234, Fed. Cas. No 16096 (C.C., D. Pa.). See also charge on the law of treason, 1 Story 614, Fed. Cas. No. 18275 (C.C., D. R.I.). In *United States* v. *Greathouse, supra,* Mr. Justice Field stated as follows:

> It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance. . . .
>
> Wherever overt acts have been committed which in their natural consequence if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities—it is a conclusion of law.

In Mr. Justice Story's charge to the Grand Jury for the District of Rhode Island at the time of the Dorr War, 1 Story 615, 616 (30 Fed. Cas. at 1047), he stated in part as follows:

> . . . To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force, to execute or towards executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place.

Likewise, the English cases have uniformly held that treason need not be successful. In *Trial of De La Motte,* 21 How. St. Tr. 687, 808, and *The King* v. *William Stone,* 6 T.R. 527, 529, 530, it was pointed out that sending or collecting intelligence for the purpose of sending it to an enemy though it never be delivered to the enemy, constitutes treason. In *Trial of Captain Vaughan,* 13 How. St. Tr. 485, the defendant was charged with levying war and adhering to the King's enemies, but as Holt, L.C.J., observed (13 How. St. Tr. at 532), "the adhering to the King's enemies is principally insisted on." The overt act of adherence alleged was that of cruising in a small ship of war, in English waters, in the service of France, with intent to take the King's ships while France and England were at war. Counsel for the defendant attacked the sufficiency of the indictment (13 How. St. Tr. at 531):

> For it is said only he went a-cruising; whereas they ought to have alleged that he did commit some acts of hostility, and attempted to take some of the King's ships; for cruising alone cannot be an overt act.

But the judges were of the opinion that the indictment was sufficient. Treby, L.C.J., said (p. 533):

> . . . and if this be not adhearing, etc., it may as well be said, that if the same persons had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. *And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them.* [Italics supplied.]

Moreover, the evidence offered by appellant was inadmissible for other reasons, which were the basis of the Government's objections.

Through a warrant officer who was in the Judge Advocate General's Department, Alaska Defense Command (40 Tr. 4557), appellant sought to introduce oral evidence to show the contents of certain confidential Army bulletins relative to the success of appellant's broadcasts (40 Tr. 4559, 4560). Appellant contends that if this testimony had not been erroneously rejected by the trial court, it would have disclosed that her broadcasts were beneficial to the morale of American troops (Br. p. 201). No attempt was made by appellant to produce the bulletins themselves or to account for their absence. The testimony offered was not the best evidence, was hearsay, called for a conclusion, and was consequently incompetent. Much of the time at the trial was consumed by appellant's offer of such palpably inadmissible evidence, which entailed argument for and on behalf of both parties and a court ruling on the evidentiary matter in dispute.

Defendant's exhibit BV for identification was a Navy press release and purported "citation" of appellant. Appellant complains of its rejection (Br. p. 202). It apparently was issued in a jocular vein, and speaks of the alleged morale-building contents of appellant's broadcasts. At the trial the United States waived any objection to the document on the ground that it was not properly authenticated or certified (50 Tr. 5596). This waiver legally meant that the document was equally admissible with the original, but inadmissible if the original itself was not competent, if produced, Title 28 U.S.C. (Rev.) § 1733; *Ex parte La Mantia,* 206 Fed. 330, 332. The exhibit in question was hearsay of the rankest sort, contained conclusions, and was not properly identified, or at all (50 Tr. 5596, 5597, 5598, 5599). It was obviously patently inadmissible, and its rejection appears so proper as not to warrant any further argument on the point.

Appellant contends that she was erroneously precluded by the trial court (Br. p. 203) from showing that her broadcasts were similar to those of the American armed forces radio program. The only question propounded to defense witness Paul in this regard was whether the music on the Zero Hour program and armed forces radio program was substantially the same. The question was too general, was obviously immaterial, and had no bearing on any issues in the case.

Appellant states (Br. p. 204) that she tried to prove that American troops were never ordered not to listen to her program, but that the court refused to permit her to elicit this type of testimony from her witness Stanley. Appellant was likewise not permitted to question Stanley as to whether any of his superiors had informed him that Orphan Ann was Tokyo Rose (39 Tr. 4348). This testimony, which it is contended the court erroneously excluded, was hearsay, immaterial, and not germane to any of the issues in the case.

3. EVIDENCE CONCERNING TREATMENT OF PRISONERS OF WAR

Appellant contends (Br. p. 210) that she was not allowed to introduce evidence that aid to Allied prisoners was contrary to the policy of the Japanese Government, although the prosecution was permitted to introduce evidence designed to "take the edge off the proof" that she aided Allied war prisoners. On cross-examination of Cousens, one of appellant's main witnesses, the Government offered in evidence a greeting card to a Japanese guard (30 Tr. 3420, 3421). This card (Ex. 47) showed Counsens' friendly attitude toward the guard (30 Tr. 3420), and was admissible as affecting Cousens' interest and credibility as a witness. Appellant says in this connection that she should have been allowed on cross-examination to question Government witness Ishii as to the circumstances under which Ishii and appellant were refused admission to Bunka prison camp. The questions regarding this matter which appellant propounded to Ishii were improper, since they went far beyond the scope of the direct examination (18 Tr. 1856). On direct examination, Ishii had testified only with reference to appellant's activities at Radio Tokyo and the commission by appellant of overt act 7 pleaded in the indictment (17 Tr. 1824, 1831).

Appellant states (Br. p. 211) that proof of systematic starvation of Allied prisoners at Bunka prison camp offered through her witness Cox was improperly excluded. Cox was an American Army officer who had been held by the Japanese as a prisoner of war at Camp Bunka, who never participated in the Zero Hour, never saw or heard that program, and did not know and had never seen the appellant (37 Tr. 4267, 4268). Appellant specifically complains because this witness was not permitted to testify whether instructions had been issued prohibiting the prisoners of war at Camp Bunka from talking to women at Radio Tokyo (37 Tr. 4260). The questions along this line were wholly collateral, possessed no probative value, and injected extraneous issues into the record which, in effect, would have

required the trial court to try another case. The lower court very properly refused to permit the trial to be diverted to the consideration of collateral issues, *Meeks* v. *United States,* 179 F. 2d 319, 321 (C.A. 9); *Local 36 of International Fishermen, etc.* v. *United States,* 177 F. 2d 320, 332 (C.A. 9), cert. denied, 339 U.S. 947; cf. *May* v. *United States,* 175 F. 2d 994, 1008, 1009 (App. D.C.), cert. denied, 338 U.S. 830.

Furthermore, the evidence offered did not show the official policy of the Japanese Government but only what were the actions of minor subordinates, such as prison or hospital guards.

4. EVIDENCE CONCERNING OTHER BROADCASTS

Appellant claims (Br. p. 215) that the prosecution was allowed to give evidence of broadcasts taking place over a nine-hour period but that her rebuttal was limited to broadcasts taking place over a one-hour period. Her statement of the Government's evidence is not entirely correct, since that evidence dealt solely with appellant's broadcasts, the witnesses testifying that they were listening to the appellant's voice on the Zero Hour program (20 Tr. 2023-2025, 2111-2112, 2113, 2116; 19 Tr. 1972-1976; 21 Tr. 2217, 2220-2224, 2244, 2248-2250; 26 Tr. 2887-2889, 2895, 2898, 2901, 2903-2904). Many of these witnesses were unable to fix the exact hour of the evening during which they heard appellant broadcast (26 Tr. 2961, 2820, 2890). As one of the witnesses testified: "Time was not a main factor to them then" (26 Tr. 2890). These American veterans, some of whom knew appellant, positively identified her voice on recordings in evidence as the voice they heard in the South Pacific.

Contrary to her contention, appellant was given a very wide latitude with respect to the introduction of evidence designed to negative the testimony of these witnesses. For example, appellant's witness Hagedorn testified concerning broadcasts emanating from Manila, Java, Saigon,

Shanghai, and Australia (38 Tr. 4403). Her witness Welker testified about picking up broadcasts coming from Germany (38 Tr. 4398). And witness Gallagher was permitted to testify about broadcasts from Manchukuo, Rangoon, Batavia, Siam, Malaya, and Hongkong (39 Tr. 4387, 4388).

However, her counsel sought to introduce evidence as to the contents of numerous other broadcasts emanating from points far distant from Tokyo involving other persons. This was not germane to the issues involved and related to collateral and extraneous matters, thus necessitating the exercise of some judicial restraint so that the jury would not be misled. Therefore, appellant's contention that her proof in this regard was unduly limited is utterly without foundation.

5. EVIDENCE CONCERNING RUMORS

Appellant makes an absurd argument that she should have been permitted to introduce evidence of rumors among the armed forces concerning matters broadcast over Radio Tokyo (Br. p. 211). Typical examples of the hearsay thus sought to be elicited will be found in the record testimony of her witnesses Stanley and Gupta, who neither knew appellant nor had any personal knowledge concerning her broadcasting activities. While Gupta was in Honolulu he had not listened to any foreign shortwave radio broadcasts (39 Tr. 4413). Yet appellant's counsel persisted in asking the witness what rumors he had heard and whether he had heard the name Tokyo Rose (39 Tr. 4414). Although her witness Stanley was not acquainted with appellant and possessed no personal knowledge of her broadcasting activities, appellant's counsel insisted they had the right to delve into hearsay and elicit testimony from witness Stanley as to a discussion he heard among American troops at Dutch Harbor, Alaska, concerning a person designated as "Tokyo Rose." The trial court properly disagreed (39 Tr. 4341, 4342).

Appellant says that this testimony was admissible for the purpose of showing that the testimony of certain Government witnesses who were American veterans was based on rumor. But the American veterans listed at page 214 of appellant's brief positively identified appellant's voice on certain recordings (Exs. 16-21) as the voice they had heard in the South Pacific. Three of the witnesses named, i.e., Velasquez, Cowan, and Henschel, knew appellant personally and had personally conversed with her either prior or subsequent to her broadcasting activities at Radio Tokyo.

6. EVIDENCE CONCERNING THE GOVERNMENT'S USE OF SUBPOENAS

Appellant feels aggrieved (Br. p. 205) because a Government objection to her blanket offer in evidence of subpoenas issued to certain Government witnesses was sustained (50 Tr. 5590). The subpoenas in question disclosed that the attendance of some Government witnesses was required a few days in advance of the commencement of the trial below. The offer was made to show an abuse of judicial process by the prosecution (50 Tr. 5588).

Appellant was not in any manner harmed by the court's rejection of her offer, because several exhibits of the same type were admitted by the court (Exs. V, CC) and because the claim of abuse of judicial process is obviously without merit. The right claimed, the protection invoked, is personal to the witness subpoenaed. Assuming, but not conceding, that the obtainment of the subpoenas in question was improper, the witnesses subpoenaed, and not appellant, are the only persons that could be heard to complain, *Wilson* v. *United States*, 221 U.S. 361; *Sachs* v. *Government of the Canal Zone*, 176 F. 2d 292, 296 (C.A. 5), cert. denied, 338 U.S. 858; *Remus* v. *United States*, 291 Fed. 501, 511 (C.A. 6); *Haywood* v. *United States*, 268 Fed. 795, 803, 804 (C.A. 7), cert. denied, 256 U.S. 689.

7. EVIDENCE RELATING TO ALLEGED ACTIVITIES OF BRUNDIDGE

Appellant unsuccessfully sought to make a vicious attack on the integrity of the Government and its prosecutors by offering testimony that one Harry Brundidge had engaged in unsavory conduct in Japan. She now asserts the refusal of the court to permit her to introduce such testimony was error (Br. pp. 207-209). Her theory is that Brundidge's conduct constituted fraud by the Government in the preparation of its case and that she should have been permitted to show it.

However, she utterly failed to lay responsibility for Brundidge's acts upon the Government's doorstep. When proof is offered under the theory adopted by appellant, it is necessary to show the party's authority or connivance with corruption. There must be very definite evidence of knowledge, connivance, participation, or ratification, *McHugh* v. *Audet*, 72 F. Supp. 394, 405. No mere technical theory of agency will suffice to charge the party, *Wigmore*, 3rd Ed., § 280.

Brundidge was not a Government witness but was available in San Francisco as a defense witness if appellant wished to call him. This fact was made known to appellant's counsel during the trial (8 Tr. 596; 50 Tr. 5569, 5586) and, although she did not call him, appellant's counsel was in possession of Brundidge's passport [36] and sought to identify it through John Hogan. Appellant now claims the court erroneously refused to admit the passport in evidence (Br. p. 207). However, the record discloses that her offer of this exhibit was for identification only (50 Tr. 5580). The offer of the passport as an exhibit was thus either withdrawn or never properly made.

The evidence offered by appellant did not disclose that Brundidge was a Government employee or agent, and she did not offer even a scintilla of evidence indicating in any

[36] Exhibit BR for identification.

way that the Government had knowledge of or had authorized, ratified, or participated in the conduct which she attributes to Brundidge. Brundidge had offered to accompany John Hogan, a Department of Justice attorney who went to Japan in 1948 for the purpose of interviewing appellant. The Attorney General accepted Brundidge's offer in this regard and paid his plane fare only. He was a newspaperman and not an agent of the Department of Justice. (8 Tr. 630, 631; 50 Tr. 5578.)

On this state of facts the court very properly refused to let the jury hear any collateral evidence concerning Brundidge's alleged illegal activities in Japan, *Lau Fook Kau* v. *United States*, 34 F. 2d 86 (C.A. 9). Brundidge was available as a witness, and appellant could have called him herself to prove his official status, if any, but she saw fit not to do so.[37] Thus, the evidence actually offered by appellant in connection with this matter was entirely collateral and constituted improper impeachment of a person who had never taken the witness stand for either party.

The same conclusion has been reached by the Court of Appeals for the Fifth Circuit in *Burton* v. *United States*, 175 F. 2d 960, cert. denied, 338 U.S. 909, wherein the court made the following observation (p. 966):

> Burton offered to prove that certain revenue agents in 1938 had threatened him about tax matters. Another revenue agent had said to a third party he was going to "shake down" Burton; and an Assistant to the United States Attorney General in Washington, after the Burton tax evasion mistrial had said: "I will get this man Burton, if it is the last thing I do." *Neither of these was a witness in the present trial, nor was the*

[37] Although the record does not disclose how appellant's counsel obtained possession of Brundidge's passport, it is logical to assume there must have been some medium of communication between them, and it might be inferred that Brundidge was not likely to support *any* of the allegations which appellant here makes with respect to his connection with the Government or his conduct in Japan.

> *named Assistant to the United States Attorney General conducting it. The Court correctly held their remarks were irrelevant.* [Italics supplied.]

The recent statement of this court in *Meeks* v. *United States*, 179 F. 2d 319, 321 (C.A. 9), relative to the exclusion of evidence pertaining to collateral issues, is likewise persuasive. In that case this court stated as follows (p. 321):

> The purpose of defendant (appellant) was not to place before the jury evidence that because witness Hartness had been assaulted by appellant, his hatred, ill will and hostility toward appellant was intensified, rather the purpose was to establish that the charges made by Hartness were false, and were motivated by hostility and ill will. The lower court very properly refused to permit the trial to be diverted to the consideration of collateral issues.

Hicks v. *Hiatt*, 64 F. Supp. 238, cited by appellant, is not at all in point. That was a *habeas corpus* case turning on the interpretation of various Articles of War and certain paragraphs of the Army courts martial manual.

Appellant says (Br. p. 208) that, since the witness Clark Lee based his testimony on Brundidge's notes, the court should have allowed her to impeach Brundidge in the manner attempted. A complete answer to this is that the record discloses that Lee typed his own notes (7 Tr. 482). There was only one instance when Lee testified concerning a statement by appellant which was referred to in Brundidge's and not Lee's notes. And in this instance the record discloses that Lee's testimony as to propaganda broadcast by appellant was based on his own recollection and not on any notes made by Brundidge. Those notes were not used at the trial (7 Tr. 483, 485, 486; 8 Tr. 652, 653, 654). Appellant's statement (Br. p. 209) that Lee's testimony is based on Brundidge's notes is therefore not borne out by the record, and

her argument that she was entitled to impeach hearsay statements attributed to Brundidge has no validity.

8. EVIDENCE OFFERED ON DIRECT EXAMINATION OF APPELLANT

The trial court refused to permit appellant to testify what an Australian war correspondent had said about her voice (46 Tr. 5160), and she now urges that this was prejudicial error (Br. p. 232). The identity or name of the Australian correspondent was not revealed or disclosed, and what such a person said was clearly hearsay and rejected as such (46 Tr. 5161). Since the statement was made during an interview which took place on September 5, 1945, long after the cessation of the Zero Hour program (46 Tr. 5160), it could not properly be classed as a part of the *res gestae.* In order to constitute a part of the *res gestae,* the declaration or statement must be made spontaneously, at or near the time of the offense committed, and here there was on spontaneity whatever about it, *Smith* v. *United States,* 47 F. 2d 518, 520 (C.A. 9).

Appellant claims error (Br. p. 234) in the court's refusal to allow her to develop a conversation with newspaperman Brundidge as to the state of her health (47 Tr. 5224). However, she had previously testified as to what Brundidge said immediately before she signed exhibit 15 (47 Tr. 5222). Any conversation appellant had with Brundidge is pure hearsay. If the evidence which appellant here offered was for impeachment, it was properly rejected because Brundidge had not taken the witness stand, *Burton* v. *United States,* 175 F. 2d 960, 966 (C.A. 5). Here again the trial court properly refused to allow extraneous issues to creep into the case, *Meeks* v. *United States,* 179 F. 2d 319, 321 (C.A. 9). We have already pointed out that Brundidge was not an agent for the Department of Justice or Attorney General, as appellant contends, *supra* pp. 104-105.

Appellant feels aggrieved (Br. p. 234) because she was not allowed to testify concerning what an American Army

officer orally told her as to the terms and conditions of her release from prison in the fall of 1946 (47 Tr. 5210, 5211, 5212). The evidence sought was objectionable as calling for a conclusion, as not being the best evidence, as being hearsay, and as being too remote in time from the issues herein involved. It concerned a conversation which took place more than a year after appellant stopped broadcasting for the enemy (Ex. 13).

9. EVIDENCE OFFERED THROUGH DEFENSE WITNESSES INCE AND PRAY

Appellant contends (Br. p. 235) that it was error for the trial judge to refuse her witness Ince permission to testify that he "ran the Voice of Freedom radio program at Corregidor in the early part of 1942" (31 Tr. 3498). This testimony was clearly repetitive, since the witness had previously testified that the last radio job he had before being taken a prisoner was "The Voice of Freedom at Corregidor" (31 Tr. 3497) and that he had broadcast that program at Corregidor (31 Tr. 3497). Since Ince's participation in the Corregidor broadcast was already known to the jury and since his duties on that island related to events occurring more than a year and a half prior to the inception of appellant's broadcasting activities on the Zero Hour program and had no bearing on the issues in this case, the trial court properly refused to let appellant pursue the matter further. Such a ruling was not an abuse of the court's discretion, *Johnson* v. *United States,* 170 Fed. 581, 583 (C.A. 1), nor was it prejudicial to appellant, particularly in view of the fact that she was given extremely wide latitude (31 Tr. 3455-3475), as disclosed by twenty pages of the record, in eliciting testimony from Ince pertaining to his activities prior to the time appellant began her treasonable activities.

Appellant contends (Br. p. 237) that the trial court erred in not allowing an Army prison attache in Japan to testify concerning mail privileges accorded to her (43 Tr. 4711,

4712). Appellant argues in her brief that she was held incommunicado, but the witness in question testified that her husband came to see her while she was in prison in Japan (43 Tr. 4712). Furthermore, the record positively discloses that this witness was permitted to testify as to the mail privileges afforded appellant and the action of the United States in lifting censorship ban on mail between the United States and Japan (43 Tr. 4714).

10. EVIDENCE RELATED TO THE WORDS "TOKYO ROSE"

Appellant contends it was error to refuse to allow her to show by hearsay evidence from her witnesses Hagedorn, Whitten, Cox, and Gupta that the appellation "Tokyo Rose" was in circulation prior to appellant's broadcasting activities (Br. p. 182). The evidence excluded was rank hearsay. None of the witnesses just mentioned knew appellant or had ever seen her, and none had personal knowledge concerning the identity of "Tokyo Rose."

Since the Government did not contend that appellant broadcast under the pseudonym "Tokyo Rose" but only under the name "Ann" or "Orphan Ann" on the Zero Hour, it was obviously immaterial whether appellant's witnesses had heard persons who listened to Japanese radio programs use the appellation "Tokyo Rose" in referring to other broadcasters.

Witness Hagedorn, an amateur monitor, never heard "Orphan Ann" broadcast and never heard broadcasts of the Zero Hour program (38 Tr. 4413, 4414). Testimony from her as to what her private radio log showed as to broadcasts other than the Zero Hour was properly excluded as being immaterial and hearsay (39 Tr. 4327-4329).

Appellant's witness Whitten never heard any program called the "Zero Hour" (38 Tr. 4348). She was properly precluded from eliciting from this witness hearsay as to

what a Navy chief petty officer had told him about "Tokyo Rose" (38 Tr. 4306).

Likewise, the court acted properly in refusing to permit appellant's witness Stanley to testify concerning a conversation among American troops in Alaska (39 Tr. 4340-4342).

Appellant's witness Cox had been an American prisoner of war in Japan. He had never seen appellant (37 Tr. 4261), had never observed or heard the Zero Hour broadcast (37 Tr. 4268), and had no personal knowledge about appellant's activities at Radio Tokyo (37 Tr. 4268). Under this state of the record, the trial court pursued the proper course in not allowing this witness to testify about hearsay matters relating to gossip, rumor, and discussions with others concerning the appellation "Tokyo Rose" (37 Tr. 4243, 4244). Likewise, the trial court was obviously correct in refusing appellant's witness Gupta permission to testify concerning rumors he had heard with regard to the cognomen "Tokyo Rose."

11. EVIDENCE OF THE REPUTATION OF GOVERNMENT WITNESSES

Appellant complains because she was not permitted to impeach Government witnesses Mitsushio, Oki, and Ishii by reputation evidence (Br. p. 230). But appellant did not lay the proper foundation for reputation evidence and did not propound the proper impeaching questions. She asked the impeaching witness as to the reputation of the three Government witnesses aforesaid with reference to truth, honesty, and integrity (1 R. 407, 408). The question should have been directed solely to the reputation of the Government witnesses as to truth and veracity.

In the absence of statute, the Federal courts in criminal cases are not bound by State laws or rules of evidence but are guided by common law principles as interpreted by the Federal courts in the light of reason and experience, *Federal Rules of Criminal Procedure* 26; *Funk* v. *United States*, 290

U.S. 371; *Wolfle* v. *United States,* 291 U.S. 7. For over a century the United States courts have uniformly held that the only proper way to attack the credibility of a Government witness by reputation evidence is to limit the impeaching question to the actual traits involved, i.e., "truth and veracity," *United States* v. *White,* Fed. Cas. No. 16,675, 5 Cranch, C.C. 38, 5 D.C. 38; *United States* v. *Masters,* Fed. Cas. No. 15,739, 4 Cranch, C.C. 479, 4 D.C. 479; *United States* v. *Dickinson,* Fed. Cas. No. 14,958, 2 McLean 325; *United States* v. *Van Sickle,* Fed. Cas. No. 16,609, 2 McLean 219; *Patriotic Bank* v. *Coote,* Fed. Cas. No. 10,807, 3 Cranch, C.C. 169, 3 D.C. 169; *Gass* v. *Stinson,* Fed. Cas. No. 5,261, 2 Sumn. 605; *Sawyear* v. *United States,* 27 F. 2d 569, 570 (C.A. 9), cert. denied, 278 U.S. 650; *Colbeck* v. *United States,* 14 F. 2d 801, 803 (C.A. 8); *Colbeck* v. *United States,* 10 F. 2d 401, 403 (C.A. 7), cert. denied, 270 U.S. 663.

In *Powell* v. *United States,* 35 F. 2d 941, 942 (C.A. 9), this court, speaking through the late Judge Rudkin, stated as follows (p. 942):

> Counsel for appellant asked a witness if he knew the general reputation of one of the Government witnesses in the city of Bremerton as a law abiding citizen. An objection to the question was sustained and upon this ruling error is assigned. The question was not limited to the general reputation of the witness for truth and veracity, and the ruling was therefore proper.

Furthermore, no proper foundation was laid for the objectionable reputation evidence appellant sought to elicit in the case at bar (1 R. 407, 408). The locale of the reputation as to Government witnesses Ishii and Mitsushio was not specified (1 R. 407, 408). The witness Saisho's knowledge of the Government witnesses' reputations may have been too remote, as the time of Saisho's knowledge of the same was not fixed in the impeaching questions appellant sought to propound (1 R. 407, 408).

12. DENIAL OF OFFERS OF PROOF

Appellant asserts that the court's refusal to allow her to make an offer of proof on several occasions was error (Br. p. 216). Although appellant already had a record on questions improperly propounded, her counsel frequently insisted, despite the court's disapproval, on making extended time-consuming offers of proof which contained improper and incompetent matter capable of influencing the jury (47 Tr. 5211, 5212; 46 Tr. 5136; 38 Tr. 4422; 39 Tr. 4385; 43 Tr. 4719; 44 Tr. 4849). She now insists that the few occasions when her counsel obeyed the directions of the court constitute prejudicial error. It would have wasted much time below if the jury were sent out each time an improper offer such as those just referred to was made by appellant's counsel. This matter was the subject of much colloquy between court and counsel. All of the offers were objectionable, but in the interest of expedition the trial court allowed many to be made in the presence of the jury. While all the authorities must and do agree that it is for the court, and not the jury, to pass upon the admissibility of evidence, there is, nevertheless, no hard and fast rule that the jury must always be withdrawn when the question of admissability of evidence is being explored, *Eierman* v. *United States,* 46 F. 2d 46, 49 (C.A. 10).

Contrary to appellant's contention, the rules of criminal procedure for the United States District Courts make no provision for offers of proof. *Federal Rules of Civil Procedure,* Section 43(c), does make provision for an offer of proof in a civil case, but even there the grant of permission to make such offers is discretionary with, not mandatory upon, the court. It has been held that under 43(c) *Federal Rules of Civil Procedure,* the making of a formal offer of proof was not a prerequisite to appellant's availing himself of error in the exclusion of evidence, *Meaney* v. *United States,* 112 F. 2d 538, 539 (C.A. 2); *Hoffman* v. *Palmer,* 129

F. 2d 976, 994 (C.A. 2), aff'd, 318 U.S. 109, reh. denied, 318 U.S. 800.

B. Evidence Offered Through Cross-Examination

1. LIMITATION OF HENSCHEL'S CROSS-EXAMINATION

Appellant complains because she was not allowed to ask Government witness Henschel whether he had an opinion as to her guilt or innocence (Br. p. 223). The testimony sought did not in any manner reflect upon the bias or interest of the witness. Appellant's authorities dealing with the cross-examination of a witness for the purpose of showing bias or interest are consequently inapposite here. The question to which a Government objection was sustained called for a conclusion from a witness who was not an expert, and invaded the province of the jury, *August* v. *United States*, 257 Fed. 388, 391 (C.A. 8); *Girson* v. *United States*, 88 F. 2d 358, 361 (C.A. 9), cert. denied, 301 U.S. 697. In *Wesson* v. *United States*, 164 F. 2d 50, 55 (C.A. 8), the Court of Appeals for the Eighth Circuit stated as follows (p. 55):

> Ordinarily there is no reason to admit opinion evidence on a matter that is fully capable of proof and comprehension from available fact testimony. And any such unnecessary opinion evidence in a criminal case that will inescapably be a plain expression of the witness' opinion of the defendant's guilt, even though by circumlocution, should be scrupulously avoided.

2. LIMITATION OF LEE'S CROSS-EXAMINATION

Appellant contends (Br. p. 219) that the trial court erroneously refused to permit her on cross-examination to ask Government witness Lee if he had not written a book in which he stated that appellant's broadcasts were entertaining. Lee first saw appellant in September 1945 (7 Tr. 528) and had never heard appellant's broadcasts (8 Tr. 588). The question which the Government objected to called

for a conclusion, sought to elicit hearsay testimony, and was therefore properly ruled out. Lee was not on the stand as an expert, and cross-questioning of him about conclusions and hearsay in his book was obviously improper.

Appellant complains (Br. p. 221) that the trial court improperly refused to allow her to question Government witness Lee as to what an Army officer had told him about "Tokyo Rose." The testimony sought was palpable hearsay and was properly excluded (7 Tr. 554).

Appellant contends (Br. p. 222) that it was error for the trial court to refuse to allow her counsel to ask the witness Lee if it had been possible for appellant to obtain counsel at the time of her interview with Lee. The question propounded (8 Tr. 625) was improper, since it called for a conclusion. Lee did not obtain any confession from appellant, but had interviewed her in his private capacity as a war correspondent (7 Tr. 479). At the time of the interview, appellant's husband was present (7 Tr. 479), and she was not at that time incarcerated; nor were any criminal proceedings then pending against her.

3. LIMITATION OF CROSS-EXAMINATION OF NII, VILLARIN, AND HALL

Appellant complains (Br. p. 225) because the court would not permit her to cross-examine Government witness Nii with reference to how much liquor he customarily drank in the spring of 1949, when appellant's counsel was in Japan (25 Tr. 2737). Appellant was not prejudiced by this exclusion because Nii had already testified that he was quite used to drinking (25 Tr. 2736).

On cross-examination this witness stated he did not remember what he said to appellant's counsel at an interview in the spring of 1949 because he (witness) was intoxicated at the time (25 Tr. 2726, 2727). Nii testified on redirect that the liquor for this occasion was furnished by one of appellant's counsel (25 Tr. 2733, 2734) who had gone

to Japan in the spring of 1949 at Government expense (51 Tr. 5720, 5721).[38]

On recross-examination Nii was asked how much liquor he customarily consumed in the spring of 1949, and Government objections to this line of questioning were sustained (25 Tr. 2737). The rulings on this improper type of attempted impeachment were well within the trial court's discretion, *Sawyear* v. *United States*, 27 F. 2d 569, 570, 571 (C.A. 9). For impeachment purposes extrinsic testimony as to particular acts is universally conceded to be inadmissible, *Shively* v. *United States*, 299 Fed. 710, 713 (C.A. 9), cert. denied, 266 U.S. 619. This court has held that testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting, because of the confusion of issues and waste of time that would thus be involved, *McKune* v. *United States*, 296 Fed. 480, 481 (C.A. 9). Furthermore, the evidence as to witness Nii's drinking proclivities was first injected into the case by appellant and not by the United States (25 Tr. 2726, 2727, 2728).

Appellant feels aggrieved (Br. p. 225) because she was not allowed to interrogate Government witness Villarin as to the identity of Japanese officers who had threatened him (26 Tr. 2858). The matter had not been delved into on direct examination and therefore was not a proper subject for cross-examination. Government witness Villarin testified on direct examination that he was sent to Japan in 1943 by the Japanese Army for purposes of indoctrination (26 Tr. 2850), but did not testify as to any Japanese threats against him compelling him to proceed to Japan. The exclusion of testimony along that line in cross-examination was therefore a matter that rested in the sound discretion of the trial

[38] Despite appellant's false assertion to the contrary (Br. pp. 131-132) the Government had, long prior to the trial, advised appellant's counsel of the identity of the Japanese whom the United States intended to bring to this country as witnesses (51 Tr. 5723), and appellant's counsel interviewed all these Government witnesses, including Nii, prior to trial (51 Tr. 5723).

court, *Kettenbach* v. *United States*, 202 Fed. 377, 387 (C.A. 9), cert. denied, 229 U.S. 613; *Aplin* v. *United States*, 41 F. 2d 495, 496 (C.A. 9).

Appellant contends (Br. p. 226) that the trial court erred in refusing to permit her to cross-examine Government witness Hall as to whether he heard any radio broadcasts from a Japanese-controlled radio station at Rabaul (26 Tr. 2942). This was not proper cross-examination and was an attempt to divert the trial into collateral issues.

Sergeant Hall of the American Air Force identified appellant's voice on exhibits 16 to 21, inclusive, as the voice he heard broadcast when he was in the South Pacific (26 Tr. 2888, 2889, 2891), and testified on direct as to the context of appellant's broadcasts which he had heard (26 Tr. 2892, 2899, 2902). He did not testify on direct examination regarding any broadcasts emanating from Rabaul. Hall testified on cross-examination that he was never stationed at Rabaul, had never visited there, did not know where Rabaul was situated, and did not know that there was a Japanese-controlled radio broadcasting station at Rabaul (26 Tr. 2941, 2942). With the record in this state, it was proper for the trial judge to refuse appellant permission to cross-examine Hall any further concerning alleged Japanese broadcasts coming from Rabaul. The witness had not testified about the matter on direct and disclaimed personal knowledge of any such broadcasts on cross. To have permitted appellant to go into broadcasts from Rabaul not only would have injected into the case matters wholly foreign to the issues on trial, *Nardi* v. *United States*, 13 F. 2d 710, 711 (C.A. 6), but would have permitted appellant to ask about a subject concerning which the witness had no knowledge.

C. The Court Properly Refused to Permit Appellant to Inspect Reports Made by the Federal Bureau of Investigation to the Prosecutor.

Appellant insists that she was entitled to examine an investigative report made by Federal Bureau of Investigation Agents Dunn and Tillman to the United States Attorney because it contained their account of what defendant's witness Normando Reyes had said about his personal history (Br. pp. 228-230). The statement of the facts which forms the basis of her argument (Br. p. 228) is not entirely correct. Thus, appellant creates the impression that what she was seeking was another statement by Reyes (Br. p. 228) when in fact she was actually trying to obtain an account of Reyes' oral story about his personal history. Although Tillman's testimony is not clear (51 Tr. 5784-5785), the colloquy between counsel makes it perfectly clear that appellant's counsel, the prosecutor, and the court were not talking about a written statement by Reyes, but were referring to notes or Federal Bureau of Investigation reports containing an account by the special agents of Reyes' oral narration of his personal history (51 Tr. 5786-5793).[39]

Appellant flatly accuses Tillman of perjury, charging he had denied the existence of the "statement" (Br. p. 228). She points to 51 Tr. 5758-5759 as substantiating this accusation; but Tillman there testified that he personally did not make any notes and that he did not recall whether Dunn had made any notes. It later developed that Special Agent Dunn had made notes of the conversation with Reyes which he destroyed after he had made a report of the matter (51

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[39] Appellant's counsel twice demanded production of a "confidential report made to the United States District Attorney in San Francisco, dated October 5, 1948, which refers in part to the witness Norman Reyes and which contains notes made by Federal Bureau of Investigation Agents John Eldon Dunn and/or Frederick G. Tillman relating to oral statements made to them or either of them on or about October 5, 1948, by Norman Reyes" (51 Tr. 5786, 5792).

Tr. 5816), this being in accordance with his usual practice (51 Tr. 5817).[40]

The facts are that on direct examination Tillman had testified relative to the voluntary execution of exhibits 52 and 54 by the witness Reyes (51 Tr. 5745-5751). On cross-examination appellant's counsel delved into the interviews between Reyes and the special agents on October 1, 2, 4, and 5, 1948, and elicited information from Tillman that Reyes had discussed his personal history with the special agents but that it had not been incorporated in Reyes' signed statements, exhibits 52 and 54 (51 Tr. 5784). An account of Reyes' oral conversation about his personal history had been included in the Federal Bureau of Investigation investigative report. Tillman testified as to Reyes' oral statements without the aid of the Federal Bureau of Investigation report or any notes (51 Tr. 5796-5799). The report was produced in court by the prosecutor (51 Tr. 5786).

It is clear from the record that neither Tillman nor Dunn was using the Federal Bureau of Investigation reports or any notes to refresh his memory while testifying. Nor is there any suggestion or intimation that either witness had read any reports or notes in anticipation of his testimony or that the prosecutor had used them as an aid in questioning the witness. Appellant makes no such contention. It is settled law that it is only where the witness uses the paper to refresh his memory while testifying that the defendant may compel the production of the writing for inspection, *Kaufman* v. *United States,* 163 F. 2d 404, 409 (C.A. 6), cert. denied, 333 U. S. 857; *Lennon* v. *United States,* 20 F. 2d 490, 494 (C.A. 8); *United States* v. *Rosenfeld,* 57 F. 2d 74, 76 (C.A. 2), cert. denied, sub nom. *Nachman* v. *United States,* 286 U. S. 556; *Little* v. *United States,* 93 F. 2d 401, 407 (C.A.

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[40] The testimony is thus in accord with the prosecutor's assurance to the court that the Government had no notes but only the written case reports which had previously been referred to (51 Tr. 5793).

8), cert. denied, 303 U. S. 644; *National Labor Relations Board* v. *T. W. Phillips Gas and Oil Co.,* 141 F. 2d 304, 306 (C.A. 3); *C. W. Hull Co.* v. *Marquette Cement Mfg. Co.,* 208 Fed. 260, 265 (C.A. 8).

In *Mullaney* v. *United States,* 82 F. 2d 638, 643, this court upheld a refusal of the trial court to allow the appellant's counsel to inspect a memorandum made by a witness concerning the event about which he was testifying but which he did not use while on the witness stand.

Goldman v. *United States,* 316 U. S. 129, involved the almost identical situation which is now before this court. There the defense counsel sought, both at a preliminary hearing and at the trial, to obtain the right to inspect *notes* made by Federal Bureau of Investigation agents concerning events about which they gave evidence, although the agents did not use the notes while testifying.[41] The Supreme Court said (p. 132):

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but are also a part of the Government's files a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case.

Appellant, therefore, offers no valid reason why she should have been permitted to fish among confidential Government reports and files. The witnesses Dunn and Tillman, who had prepared the report, were present and on the witness stand. Both were able to answer all questions with reference to their oral conversations with Reyes about his personal history. Moreover, the subject matter was entirely collateral to the main issues in the case and to a certain extent was collateral to the issue of whether Reyes had

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41 See *United States* v *Goldman* 118 F. 2d 310, 314-315 (C.A. 2).

testified truthfully with respect to the circumstances under which he had executed exhibits 52 and 54.

The Federal Bureau of Investigation report was confidential, the production and disclosure of which was prohibited by regulation of the Attorney General,[42] and was a part of the work papers used by the prosecutor in preparing the case. It has been held that the Government is not required to turn over such papers to the opposite party, *Ex parte Sackett,* 74 F. 2d 922 (C.A. 9); *Boske* v. *Comminggore,* 177 U. S. 459; *Hickman* v. *Taylor,* 329 U. S. 495. If, as the last of these cases holds, a party to a civil action is not entitled to such papers, there is no reason why a defendant in a criminal action should be so entitled, since in a criminal action there is no mutuality of discovery.

The cases cited by appellant relate to situations different from that here presented. In *Krulewitch* v. *United States,* 145 F. 2d 76 (C.A. 2), the court was dealing with a signed statement, given by the chief prosecuting witness to a Federal Bureau of Investigation agent, which completely exculpated the defendant and was directly contrary to the account of the events constituting the crime which the witness had related on the witness stand. *United States* v. *Andolscheck,* 142 F. 2d 503 (C.A. 2), cited by appellant, involved certain official reports made by the defendants in the regular course of government business which narrated defendants' conduct in dealing with certain "permittees." In *United States* v. *Beekman,* 155 F. 2d 580 (C.A. 2), also cited by appellant, the defendant was seeking official records of the Office of Price Administration showing that certain Government witnesses had been administratively found guilty of violating OPA regulations and had been penalized therefor.

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[42] Order No. 3229 dated May 2, 1939, issued pursuant to 5 U.S.C. § 22. See 11 Fed. Reg. 4920.

Thus, in each case, the documents in question were relevant and admissible as evidence. Here the report was not admissible as evidence, and the only purpose of appellant's request was to enable her to engage in a fishing exhibition.

IX

THE ARGUMENT OF THE PROSECUTORS WAS DIGNIFIED, TEMPERATE, AND UNPREJUDICIAL

The underlying theme of appellant's entire brief seems to be that the prosecutors were continually guilty of misconduct, and that the court itself, to say the least, was indulgent of such practices. This is but a continuation of the appellant's unsuccessful efforts in the trial court to "try the prosecution," an age-old practice which culminated in this case in the defense counsel's accusation in the closing argument that Government witnesses had perjured themselves (1 Arg. 155); that the United States had suppressed material evidence (1 Arg. 186); that special agents of the Federal Bureau of Investigation had lied (2 Arg. 240); and that the prosecution was "unfair, unjust and downright crooked" (1 Arg. 119). Most of appellant's insinuations have heretofore been answered by our previous argument. We are here concerned only with appellant's direct accusation of improper conduct.

After first stating that the prisoners of war were not on trial in this case, United States Attorney Hennessy remarked that some of the prisoners of war "may be put on trial" (1 Arg. 47). Appellant's counsel later protested, and the court immediately told the jury: "We are not concerned about anyone that may or may not be prosecuted. So you may disregard that for any purpose in this case" (1 Arg. 49). In the closing argument, the prosecutor stated that "this matter should serve as a warning to others that they cannot, in our great hour of peril, desert their country and with impunity, adhere to the enemy—and not, if the United

States survives, be brought to book before a Federal Court of justice'' (2 Arg. 344-345). During his review of the evidence, the prosecutor omitted one sentence from Sugiyama's testimony (2 Arg. 231). The sentence read, ''Let me cheer you up with some music.'' At the close of the Government's argument, the appellant directed the court's attention to these matters and in doing so supplied the missing sentence from Sugiyama's testimony (54 Tr. 5940). The court then told the jury that argument is not evidence, that the matter of evidence is entirely with the jury, that they heard the evidence, and that it was for them to take action on that evidence (54 Tr. 5941). This instruction was later repeated by the court in its charge to the jury, in which the jury was told: ''You should distinguish carefully between what has been testified by the witnesses and what has been stated by the attorneys. Statements and arguments of counsel are not evidence in the case'' (54 Tr. 5987). Shortly thereafter, the court told the jury what constituted evidence (54 Tr. 5988).

Thus, the possibility of any prejudice arising from these isolated remarks, even if they be considered in some degree unwarranted, was entirely removed by the action of the trial court when appellant's attorney directed attention to them. In addition to the instructions which the court gave to the jury at the time of appellant's protest and to similar ones which were given in the charge, the court told the jury at the outset of the final charge that they were to perform their duty without bias or prejudice, that the law does not permit jurors to be governed by sympathy, prejudice, or public opinion, and that they are expected to reach a verdict just, as to each side, regardless of what its consequences may be (54 Tr. 5943). Again at the end of the charge, the court told the jury, '' * * * the question before you can never be whether the government wins or loses the case. The government always wins when justice is done, regard-

less of whether the verdict be guilty or not guilty" (54 Tr. 5991). Thus, even if the statements of Government counsel be considered as being unwarranted, they are cured by the court's admonitions to the jury. *Langford* v. *United States,* 178 F. 2d 48, 54 (C.A. 9), cert. denied, 339 U. S. 938; *Phelan* v. *United States,* 249 Fed. 43 (C.A. 9); *Diggs* v. *United States,* 220 Fed. 545, 555-556 (C.A. 9), affd., sub nom. *Caminetti* v. *United States,* 242 U. S. 470; *Carroll* v. *United States,* 154 Fed. 425 (C.A. 9). This is particularly true where, as here, appellant made no further request for other or different instruction on the point. *Borgia* v. *United States,* 78 F. 2d 550, 554 (C.A. 9), cert. denied, 296 U. S. 615.

The foregoing decisions of this circuit are in conformity with that of the Supreme Court, which held in *Holt* v. *United States,* 218 U. S. 245, that the conduct of a United States Attorney in characterizing certain alleged statements of the defendant as confessions, although they had been excluded, did not require a reversal of the conviction for homicide where the court had told the jury that they were to decide the case on the testimony of the witnesses and not on what counsel might say.

In the opening argument the United States Attorney commented on the defense contention that an agreement existed between the witnesses Ince, Cousens, and Reyes to sabotage the Zero Hour program. After commenting on the favorable living conditions of these prisoners at Tokyo hotels, the United States Attorney referred to Reyes' statements to the Federal Bureau of Investigation as "quite illuminating." At that time he told the jury that Government exhibit 52 was a very important piece of evidence, and that it proved conclusively that there was no sabotaging of the program (1 Arg. 35-36). Thereafter, he read exhibits 52 and 54 to the jury. In the closing argument, the prosecutor referred to exhibit 52 in connection with Major Cousens' belief in the Greater East Asia Co-Prosperity Sphere (2 Arg. 328).

Exhibits 52 and 54 were written pretrial statements which the defense witness Reyes had signed and delivered to agents of the Federal Bureau of Investigation and were in direct contradiction to much of Reyes' direct testimony. Exhibit 52 was offered as affecting the credibility of Reyes (33 Tr. 3779); exhibit 54 was admitted as a part and parcel of Reyes' cross-examination (33 Tr. 3825).

The statements in the United States Attorney's opening argument were proper, since if Reyes had lied as to the agreement between himself and Cousens and Ince, it would tend to destroy all testimony with respect to any such agreement. Considered in such a light the exhibit is illuminating, is very important, and the conclusion that it proves that there was no sabotage is an inference which the United States Attorney was entitled to draw from the evidence.

Reyes testified that everything he had told the special agents of the Federal Bureau of Investigation was true (32 Tr. 3688; 33 Tr. 3797) and that exhibit 52 was a true statement (33 Tr. 3746, 3749). He also confirmed the verity of many of the facts which were set forth in exhibits 52 and 54 (33 Tr. 3746, 3804-3807, 3811, 3816). Reyes thus not only admitted having made the previous statements contained in the exhibits but went further and confirmed the truth of a large part of the material contained therein. When this is coupled with his statements that he had told the truth to the Federal Bureau of Investigation agents, and that exhibit 52 was true, he in effect was testifying presently on the stand as to the truth of the matters related in the statement. These were not collateral matters but concerned the very issues in the case. Therefore, Reyes' testimony on cross-examination was more than evidence impeaching his direct testimony. It was affirmative proof.

Under these circumstances, the exhibits in question were a part of Reyes' cross-examination and could be considered evidence in the case, *Curtis* v. *United States,* 67 F. 2d 943,

946 (C.A. 10). As Judge Learned Hand said in *DiCarlo* v. *United States,* 6 F. 2d 364, 368 (C.A. 2), cert. denied, 268 U. S. 706:

> If from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

The above language was quoted with approval by this court in *Craig* v. *United States,* 81 F. 2d 816, 828, cert. denied, 298 U. S. 690.

Accordingly, the jury was entitled to gather the truth from the whole conduct and bearing of the witness Reyes, even in respect of contradictory statements he may have made at other times, *Kowalchuck* v. *United States,* 176 F. 2d 873 (C.A. 6).

Bridges v. *Wixon,* 326 U. S. 135, cited by appellant, deals with a different problem. In the situation there presented, the Government had introduced evidence of prior contradictory statements to impeach its own witness, by whom it was surprised.

Therefore, in its argument the Government was entitled to treat exhibits 52 and 54 as being an integral part of the evidence in the whole case.

The alleged erroneous argument of the prosecution mentioned at page 135 of appellant's brief (2 Arg. 329), should not be considered on appeal because, as appellant states (Br. p. 135), she did not object thereto. This court has very recently held that failure to interpose a timely objection to alleged improper argument constitutes a waiver of the right to urge the same on appeal, *Langford* v. *United States,* 178 F. 2d 48, 53 (C.A. 9), cert. denied, 339 U. S. 938.

But appellant insists that she made objection to the following argument and that it was prejudicial:

> She unhesitatingly, unequivocally denies broadcasting those words or anything like it. Well you can understand why she refuses to admit the voicing of that broadcast. The Government has produced not two witnesses, but five who contradict her testimony. Mitsushio, George Mitsushio, Kenkichi Oki, Satoshi Nakamura, Clark Lee and Richard Henschel. (2 Arg. 303).

The appellant contends the foregoing argument is improper on the ground that it placed Clark Lee as a witness to overt act 6, when in reality he did not testify to that act. Overt act 6 dealt with broadcasts about the loss of ships. The appellant categorically denied that she had broadcast about the loss of ships at any time whatsoever (47 Tr. 5301). Clark Lee testified that the appellant had told him that she broadcast in substance as follows: "Orphans of the Pacific, you really are orphans now. How are you going to get home now that all of your ships are sunk?" (7 Tr. 485-486). Immediately after the argument quoted above, the Government quoted to the jury the verbatim testimony of Clark Lee on this point (2 Arg. 304). It will be observed that in its argument the Government was concerned with appellant's complete and unequivocal denial of the use at any time of any language whatsoever about the loss of ships. There is no doubt but that Clark Lee's testimony is contradictory of her absolute and complete denial about broadcasting the words in question, since it attributes to appellant an admission directly opposite to her trial testimony. It will be observed that the Government did not contend that Clark Lee was a witness to the commission of overt act 6 but only that his testimony was directly contradictory to appellant's testimony at the trial. It was quite proper for the Government to use the Lee testimony in this fashion.

It is difficult to perceive in what way the jury might have been misled. The testimony of Lee, which was read to the jury, specifically mentioned Formosa. The Government counsel told the jury that they were not bound by argument and that they were the sole judges of the facts and the credibility of the witnesses (2 Arg. 258, 259, 261, 262, 263, 284). The court instructed the jury that they were the judges of the facts, the credibility of the witnesses, and the weight to which their testimony is entitled (54 Tr. 5943, 5946, 5988). The jury was also charged that argument is not evidence and to consider the evidence only for those purposes for which it was admitted (54 Tr. 5941, 5990-5991). Direct and circumstantial evidence was defined in the court's charge (54 Tr. 5945), and the jury was told that direct evidence of two witnesses to the same overt act was required and they were particularly instructed that in this case direct evidence consisted of two eyewitnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act (54 Tr. 5967).

In addition, the court charged the jury that the witnesses who testified concerning the commission of overt act 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura (54 Tr. 5955) and that the credibility of these witnesses was a matter for their determination (54 Tr. 5952). In its argument to the jury, the Government also stated that the law required the direct testimony of two witnesses to the same overt act before such an act could be found proved (2 Arg. 283).

Accordingly, the Government's argument here was not only proper, it could not have conceivably confused or misled the jury as to who were the witnesses who gave direct evidence about the commission of overt act 6.

Ordinarily it is within the discretion of the trial court to determine whether or not the limits of professional propriety have been exceeded, and the exercise of that discre-

tion will not be reviewed in an appellate court unless the invective is so improper that it may be seen to be clearly injurious, *Johnston* v. *United States,* 154 Fed. 445, 449 (C.A. 9). In order to entitle an accused to a reversal it must appear that the argument objected to was plainly unwarranted and so improper as to be clearly injurious, *Chadwick* v. *United States* 141 Fed. 225, 245 (C.A. 6); Cf. *Dimmick* v. *United States,* 135 Fed. 257, 270 (C.A. 9), cert. denied, 189 U. S. 509.

The prosecutors did not dwell at great length on any of the foregoing matters. They are minor instances in a six-hour argument at the conclusion of a three-month trial (52 Tr. 5926). The argument of the Government should be viewed in its entirety to ascertain whether it was so prejudicial as to require a reversal. A careful reading of the entire argument on behalf of the Government will disclose that it was dignified, temperate, and fair. There are many instances where the prosecutor leaned over backwards to protect and safeguard appellant's rights. Thus, the jury was told by the prosecutor that counsel's arguments were not binding on them (2 Arg. 258), that the burden was on the Government to prove appellant's guilt beyond a reasonable doubt (2 Arg. 262), that she was presumed to be innocent (2 Arg. 263), and that the Government desired a fair and impartial trial for appellant and not the conviction of an innocent person (2 Arg. 258-264). When this is contrasted with the intemperate and unfounded attack by the appellant's counsel upon the integrity and honor of the prosecutors, it is apparent that no prejudice could have resulted from the isolated remarks set forth above.

Here, as in *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 242, the comments of appellant's counsel were but casual episodes in a lengthy summation, and not at all reflective of the type of the Government's argument as a whole. There is no such gross and persistent misconduct as per-

meates the entire argument in *Berger* v. *United States,* 295 U. S. 78. *Taliaferro* v. *United States,* 47 F. 2d 699, and *Turk* v. *United States,* 20 F. 2d 129, upon which appellant relies (Br. pp. 197, 199) are concerned with situations different from those here presented. In the *Taliaferro* case the prosecutor went completely outside the record and made statements of facts which were within his own personal knowledge. In the *Turk* case the prosecutor dwelt at length on the unsavory conditions in the community and also related facts known to him which were not in evidence. This is not the case here and appellant makes no such contention. In *Minker* v. *United States,* 85 F. 2d 425 (C.A. 3), cited by appellant (Br. p. 135), the court found the entire argument to be permeated with the personal views of the prosecutor and insinuations as to his personal knowledge of circumstances surrounding the case. *Beck* v. *United States,* 33 F. 2d 107, 114 (C.A. 8), was a case of persistent misconduct after rebuke by the trial court, a factor not present here. As to the omission of the sentence from Sugiyama's testimony, it should be apparent that counsel was not expected to quote the evidence verbatim, especially in a three-month trial.

As the Supreme Court has pointed out, if every remark of counsel outside the record were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy and the excitement of trial, even the most experienced counselors are carried away, *Dunlop* v. *United States,* 165 U. S. 486, 498; *Crumpton* v. *United States,* 138 U. S. 361, 364.

X

INSTRUCTIONS

A. Instructions Given

The illustration given to the jury in connection with the instruction as to the difference between motive and intent (54 Tr. 5975) was not argumentative. The facts set out

were far removed from the evidence in the case and the situation portrayed was different from that of appellant. Its object was merely to clarify for the jury the difference between intent and motive. Illustrations are not objectionable merely because they bear hardly upon the defendant or only because the transaction with which the defendant is charged is one of like character and indicative of the same intent, *Allis* v. *United States,* 155 U. S. 117; *Luteran* v. *United States,* 93 F. 2d 395, 401 (C.A. 8), cert. denied, 303 U. S. 644.

The instruction—that appellant could not avoid the consequences of her act, if the jury found that she voluntarily performed acts which she knew would give aid and comfort to the enemy of the United States and by so doing intended to assist the enemy or injure the United States and betray her own country, by asserting her motive was not to aid the enemy, or that her motive was a desire for financial gain or to provide herself with means of a livelihood—was one which properly took cognizance of certain of appellant's evidence. Appellant had introduced evidence that she had difficulty obtaining employment; that she had gotten into debt and wanted another job to help pay her obligations; that the Zero Hour was an entertainment program and that she had been so informed (45 Tr. 4968, 4969, 4983, 4984, 4985, 4988, 4999, 5019; 46 Tr. 5104; 47 Tr. 5307-5308). The Government's evidence also touched upon appellant's motives with respect to her employment at the radio station (7 Tr. 487, 488; 9 Tr. 665; 14 Tr. 1405; 40 Tr. 4531; 48 Tr. 5361). These matters were touched upon in her opening statement, and the closing argument stressed the idea that the Zero Hour was only entertainment (28 Tr. 3079, 3080, 3084-3085; 1 Arg. 121-125, 140, 143, 151, 160, 170, 205, 225-226; 2 Arg. 237, 257).

Thus, contrary to appellant's argument (Br. pp. 188-189), the instruction deals with matters which appellant deemed

important as tending to exculpate her and served not to confuse, but to clarify, the issue to be decided by the jury. Almost identical instructions were upheld in *Chandler* v. *United States,* 171 F. 2d 921, 943 (C.A. 1), cert. denied, 336 U. S. 918, and *Best* v. *United States,* 184 F. 2d 131, 137 (C.A. 1).

In referring to the issue of citizenship, the court informed the jury that there was evidence that the appellant was born in the United States on July 4, 1916, and that in 1941 and 1947 she executed applications for passports in which she stated under oath that she was born in the United States and was a native-born American. These facts were undisputed at the trial (44 Tr. 4909, 4922; 47 Tr. 5216; 50 Tr. 5550-5552). Moreover, appellant testified that she claimed United States citizenship as late as August 1947 (50 Tr. 5554) and that she still wished to be a citizen of the United States (50 Tr. 5554). The court, therefore, was not singling out the Government's evidence to the exclusion of that of the appellant. It was only referring to evidence upon which both sides were in agreement and therefore was not unfair to appellant.

That part of the instruction which charged the jury that it was not necessary that the acts done or the aid given be successful or that the Japanese propaganda achieve the desired result was a correct statement of the law. It is immaterial that the enemy mission which appellant assisted did not achieve its purpose, *Chandler* v. *United States,* 171 F. 2d 921, 941 (C.A. 1), cert. denied, 336 U .S. 918; *Haupt* v. *United States,* 330 U. S. 631. The law with respect to this point has been fully discussed, *supra* pages 96-98.

Appellant urges (Br. pp. 132-134) that the court erred in informing the jury that "The witnesses who testified *regarding* the commission of overt act 6 were George Mitsushio, Kenkichi Oki, and Satoshi Nakamura" (54 Tr. 5955). Her argument is that by the above statement the court with-

drew from the jury the function of deciding whether the witnesses, and particularly the witness Nakamura, were all testifying to the same overt act.

In confining her argument to the one sentence set out above, appellant avoids the intendment of the charge as a whole and particularly that part which relates to the evidence necessary to prove the commission of an overt act. The sentence did not stand alone but was to be taken with what preceded it and also with what followed it, *Boyd* v. *United States,* 271 U. S. 104, 107. When the entire instruction relative to the proof of overt acts is examined, it is clear that the court did not in any way impinge upon the jury's prerogative of determining whether there was credible direct evidence from two witnesses to each overt act.

Before reading the overt acts charged in the indictment and naming the witnesses who had testified regarding each act, the court informed the jury that it would read the names of the witnesses who had so testified and then instructed the jury that:

> The credibility of the witnesses to the overt acts is for you to determine. It is for you to say whether or not you believe these witnesses and to what extent in determining whether any overt act has been proved beyond a reasonable doubt by the direct testimony of two witnesses that the defendant committed the act. [54 Tr. 5952-5953.]

The court later informed the jury of the constitutional requirement that no person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act and told them that, with respect to each overt act charged, the burden was upon the prosecution to produce at least two witnesses to the whole of the same overt act (54 Tr. 5966). Immediately thereafter, the jury was told that the two witnesses must be witnesses whose testimony gives direct evidence of the act; that direct evidence gives

eyewitness account of a fact; and that persons testifying to admissions, if any, claimed to have been made out of court, and other persons not giving eyewitness testimony as to one or more of the overt acts, could not be counted as witnesses in determining whether the constitutional requirement had been met (54 Tr. 5966-5967).

The court then impressed upon the jury that the minimum proof necessary was direct evidence of the overt act given through the testimony of at least two witnesses, and that the jury must be convinced beyond a reasonable doubt of the truth of such testimony. The jury was then charged that:

> Direct evidence of any overt act charged in this case would necessarily consist of the testimony of eyewitnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act. So the constitutional requirement is met only when, after considering the testimony given by all witnesses who testified as to an alleged overt act, the jury finds that the whole of such overt act—each movement and sound, if any, comprising the alleged act—is established as charged in the indictment by the testimony of at least two witnesses. [54 Tr. 5967-5968.]

Near the end of its charge, the court told the jury:

> Whether or not the whole of an alleged overt act submitted to the jury for consideration has been proved by the direct testimony of at least two witnesses; and if so proved to have been committed by the defendant, whether or not the overt act was committed by the defendant knowingly, intentionally, wilfully, unlawfully, feloniously, traitorously and treasonably as charged in the indictment; and whether or not the overt act, if so committed, actually gave aid and comfort to the enemy —are all questions of fact, which it is the exclusive province of the jury to determine from all the evidence in the case. [54 Tr. 5988-5989.]

When the entire charge is construed, it is obvious that the jurors clearly understood that it was for them to decide whether there was credible direct evidence from two witnesses as to the commission of the same overt act.

B. Instructions Refused

Requested instruction No. 30A (1 R. 292) was correctly refused for several reasons. Certain of appellant's admissions relative to her United States citizenship were made prior to the commission of the offense for which she was convicted.[43] Such admissions need not be corroborated, *Warszower* v. *United States,* 312 U. S. 342, 345-347; *United States* v. *Potson,* 171 F. 2d 495, 499 (C.A. 7). In this respect alone the request was improper, since it did not distinguish between the admissions made before the commission of the offense and those made subsequently.

Moreover, in this circuit the rule is well settled that it is unnecessary to make full proof of the *corpus delicti* independently of the defendant's confessions, *Wynkoop* v. *United States,* 22 F. 2d 799; *Wiggins* v. *United States,* 64 F. 2d 950, cert. denied, 290 U. S. 657. *Pearlman* v. *United States,* 10 F. d 460, cited by appellant (Br. p. 191), makes this clear. The rule in this circuit as announced in the foregoing cases is that the corroborative evidence need not independently establish the *corpus delicti* beyond a reasonable doubt. It is sufficient if the corroborative evidence, when considered in connection with the confession or admission, satisfies the jury beyond a reasonable doubt that the offense was in fact committed. Other courts of appeal have so held, *Ercoli* v. *United States,* 131 F. d 354 (App. D. C.); *United States* v. *Kertess,* 139 F. 2d 923 (C.A. 2,) cert. denied, 321 U. S. 795; *Jordan* v. *United States,* 60 F. 2d 4 (C.A. 4), cert.

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[43] See exhibit 4, "Application for Passport" dated September 8, 1941; exhibit 6, "Affidavit of Registration" dated July 17, 1940; and exhibit 7, "Application for Evacuation" dated March 30 and September 2, 1942.

denied, 287 U. S. 633. The rule is one of sufficiency of the evidence.

Where, as here, there was an abundance of evidence in addition to the appellant's admission, there was no basis for the instruction requested. Appellant cites no cases holding that she was entitled to the instruction requested. *Pearlman* v. *United States, supra,* and *Goff* v. *United States,* 257 Fed. 294, do not deal with instructions but only with the rule as respects the sufficiency of the evidence. Indeed, the *Pearlman* case indicates that the matter was adequately covered by the usual instruction on presumption of innocence and reasonable doubt. Such instructions were given by the court in this case (54 Tr. 5943-5946). The court also told the jury that:

> The written statement of the defendant, made to an agent of the Federal Bureau of Investigation is not a "confession in open court" . . . upon which standing alone, the defendant might be convicted. [54 Tr. 5946.]
>
> * * * * * * *
>
> All testimony as to any oral statements or admissions alleged to have been made by a defendant outside of court should be considered with caution and weighed with care. [54 Tr. 5948.]

The only cases dealing with requested instructions on this matter have held that the requests in question were properly refused, *Daeche* v. *United States,* 250 Fed. 566 (C.A. 2); *George* v. *United States,* 125 F. 2d 559, 563 (App. D. C.); *Murray* v. *United States,* 288 Fed. 1008 (App. D. C.), cert. denied, 262 U. S. 757. Here, as in *George* v. *United States, supra,* the proposed instruction was not a sufficient statement of the law, since it failed to inform the jury that the corroborative evidence need not itself be sufficient independently to prove the issues involved.

Requested instruction 84 (1 R. 296) amounts to a comment on the specific piece of evidence to which it relates.

Moreover, the court told the jury that appellant "could have renounced and abandoned her citizenship, together with its privileges and obligations at any time" (54 Tr. 5961). The jury was instructed that:

> . . . evidence as to acts or happenings or events not charged in the indictment, which has been received for the sole and limited purpose of aiding the jury to determine the defendant's state of mind or intent during the period specified in the indictment, may be considered along with all other evidence in the case in determining whether or not the defendant did "adhere to the enemies of the United States, and more particularly, to wit, the Imperial Japanese Government," as charged in the indictment. [54 Tr. 5964.]

Appellant was not entitled to an instruction singling out her evidence on the issue of intent particularly since the matter was covered by the general instruction set out above, *Klein* v. *United States,* 176 F. 2d 184 (C.A. 8), cert. denied, 338 U. S. 870; *Bird* v. *United States,* 187 U. S. 118, 130-131; *Wiederman* v. *United States,* 10 F. 2d 745, 746 (C.A. 8); *Lewis* v. *United States,* 295 Fed. 441, 447 (C.A. 1), cert. denied, 265 U. S. 594.

Appellant argues that she was prejudiced by the failure of the trial court to give her requested instruction No. 88 (Br. p. 192). The first sentence of the requested instruction reads:

> Various alleged statements by the defendant as well as records of voice tests have been admitted into evidence for your consideration.

The requested instruction then states that before dealing with these from any other standpoint the jury must find that appellant made them voluntarily, and that if the jury does not find that the Government has shown the statement to be voluntary they must discard it from their consideration.

The requested instruction was improper in that its scope was too broad. By its terms it would apply to every oral or written statement attributed to the appellant by any witness, regardless of whether appellant had or had not raised the issue of voluntariness. There were many statements attributed to appellant by the witnesses from Radio Tokyo and by the witnesses who heard her over the radio.

Appellant now seeks to refine the instruction into one concerning the voluntariness of confessions (Br. p. 193). But, as we have previously pointed out, *supra,* pages 55-56, she never made any confession. In her brief she does not point out to what statement or admission such an instruction should have been applicable. Nor did she do so at the trial. She was content with an objection on the ground that the refused instruction "states the correct law or is applicable to the evidence and not covered by other instructions" (53 Tr. 5934). Number 88 was but one of approximately 120 requested instructions which appellant listed under this objection (53 Tr. 5934-5935). She did not point out to the court wherein she had raised the issue of or controverted the voluntary character of any particular admission or statement attributed to her and request an appropriate instruction with reference to such admission or statement. Certainly Rule 30, Federal Rules of Criminal Procedure, contemplates that a party in a criminal case must state "distinctly the matter to which he objects and the grounds of objection." The reason for the rule is to enable the trial court to correct any mistakes by his instructions, and the failure of appellant to point out the necessity of and the factual basis for the instruction for which she now contends falls within the fair meaning of the rule. Cf. *Schuermann* v. *United States,* 174 F. 2d 397 (C.A. 8), cert. denied, 338 U. S. 831; *United States* v. *Wilson,* 154 F. 2d 802, 804 (C.A. 2), remanded, 328 U. S. 823. If there was any issue as to whether any statement attributed to appellant

was involuntary, it was her duty under Rule 30 to point out as to what exhibit or testimony it existed and request appropriate instructions on the point.

Furthermore, as we pointed out, *supra,* page 56, appellant did not specifically raise the question as to the voluntary character of her statements or admissions at the time they were offered in evidence or at any other time, hence there was no reason for the court to give such an instruction on its own initiative.

Moreover, as pointed out, *supra,* pages 45-48, 57-61, the evidence upon which appellant apparently relies to establish the necessity for the instruction which she contends should have been given, is insufficient to warrant a submission of the question to the jury. Where there is no evidence from which a jury could find that a statement or admission was involuntary, there is no need for an instruction covering the matter, *Stillman* v. *United States,* 177 F. 2d 607, 619 (C.A. 9); *Lewis* v. *United States,* 74 F. 2d 173, 178 (C.A. 9); *Raarup* v. *United States,* 23 F. 2d 547, 548 (C.A. 5), cert. denied, 277 U. S. 576.

Requested instructions numbered 161-169 (1 R. 318-320) would have informed the jury that the appellant must be acquitted if they found she was denied a speedy trial or if they had a reasonable doubt that she had been accorded a speedy trial. Such instructions were clearly erroneous statements of the law, and the court was correct in refusing them. This matter has been discussed, *supra,* pages 31-33. The offense of which appellant was convicted is not one which is covered by the statute of limitations, and laches is no defense.

Requested instruction numbered 60 (1 R. 295) was a statement as to the effect of the evidence. The court quite properly left it to the jury to determine whether any overt act actually gave aid and comfort to the enemy, and cautioned them that it was not suggesting or intimating, by submitting

an overt act for their consideration, that any overt act actually gave aid and comfort to Japan in its war against the United States (54 Tr. 5988-5989).

C. Summary

A careful reading of the entire charge will suffice to show that the jury was properly and adequately instructed as to the issues involved and the law governing the case. Under these circumstances, there is no ground for reversal, *Stein* v. *United States,* 166 F. 2d 851, 855 (C.A. 9), cert. denied, 334 U. S. 844; *Taylor* v. *United States,* 142 F. 2d 808, 817 (C.A. 9), cert. denied, 323 U. S. 723.

CONCLUSION

For the reasons heretofore set forth it is respectfully submitted that the judgment of the Dsitrict Court should be affirmed.

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APPENDIX A

UNITED STATES CODE, TITLE 10

§ 15. Use of Army as posse comitatus.

It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or by both such fine and imprisonment. *Provided,* This section shall not be construed to apply to the District of Alaska. (June 18, 1878, ch. 263, § 15, 20 Stat. 152; Mar. 3, 1899, ch. 429, § 363, 30 Stat. 1325; June 6, 1900, ch. 786, § 29, 31 Stat. 330.)

APPENDIX B

13 Department of State Bulletin, p. 480, September 30, 1945

Authority of General MacArthur as Supreme Commander of the Allied Powers

The text of a message transmitted on September 6 through the Joint Chiefs of Staff to General MacArthur follows. It was prepared jointly by the Department of State, the War Department, and the Navy Department and approved by the President on September 6. The message is a statement clarifying the authority which General MacArthur is to exercise in his position as Supreme Commander for the Allied powers.

1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration [1] forms a part

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[1] The Proclamation Defining Terms for Japanese Surrender appears in the Bulletin of July 29, 1945, p. 137. The message from the Japanese Government to the Government of the United States referred to this proclamation as follows: "The Japanese Government are ready to accept the terms enumerated in the joint *declaration* which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and

of our policy with relation to peace and security in the Far East.

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later subscribed by the Soviet Government, with the understanding that the said *declaration* does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.'' See BULLETIN of Aug. 12, 1945, p. 205.

This proclamation was issued while the Tripartite Conference of Berlin was in progress at the Cecilienhof near Potsdam. See BULLETIN of Aug. 5, 1945, p. 153.

The Instrument of Surrender, in which Japan accepted the ''provisions set forth in the *declaration* issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics . . .'' appears on pages 346-65 of the BULLETIN of Sept. 9, 1945.

APPENDIX C

The following cross-reference to the points set forth in appellant's brief is submitted for the convenience of the Court. It should be noted, however, that due to the difference in organization and legal approach to the issues presented and the complex nature of this appeal, it is not possible to make such cross-reference accurate in all respects, since certain of the points involved do not lend themselves readily to cross-reference.

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